

Thinking with Culture in Law and Development

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INTRODUCTION

This Article considers a renewed emphasis on culture within law and development scholarship and practice—what I term the “turn to culture.” In the 1980s and 1990s, rule-of-law projects, comprising a multi-billion dollar development effort devoted to strengthening legal institutions abroad, produced many disappointing results.¹ In the wake of sobering assessments of the effects of these

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1. Numerous legal scholars have documented the surge of rule-of-law promotion efforts by international aid agencies, government institutions, and philanthropic foundations, as well as their shortcomings in practice. See Bryant G. Garth, *Building Strong and Independent Judiciaries Through the New Law and Development: Behind the Paradox of Consensus Programs and Perpetually Disappointing Results*, 52 DEPAUL L. REV. 383 (2002); see also THOMAS CAROTHERS, AIDING DEMOCRACY ABROAD: THE LEARNING CURVE 163-65, 170-76 (1999); Thomas Carothers, *The Rule of Law Revival*, FOREIGN AFF., Mar.-Apr. 1998, at 95 (1998); Jacques deLisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT’L ECON. L. 179, 180-81 (1999).

projects, a number of committed law professors proposed turning away from the purely institutional or technical elements of rule-of-law promotion and towards an exploration of the cultural and ideological forces underpinning social change. More specifically, they invited law and development scholars and practitioners to consider whether changing local cultures could contribute to achieving development and the rule of law.

In this Article, I assess what I call neocultural interventionist proposals to promote the rule of law,² both in academic publications,³ and their growing uptake in development policy.⁴ Neocultural interventionists argue that transplanted laws, rules, and institutions are unlikely to produce their intended social effects in divergent social contexts or, for that matter, to produce any effects at all. And they suggest changing the hearts and minds of ordinary people in order to make these institutional reforms more determinate and effective. They therefore aspire to contextualize what they aptly describe as flawed approaches to law reform—approaches that pay insufficient attention to the individual culture-bearers who are law's users. Both academic and programmatic versions of this project agree that development programs should inculcate a "rule of law culture" not only among legal elites but in the everyday users of the legal system: "culture" must change so that it perpetuates a readiness to turn to law and legal institutions for solutions to conflict, an expectation that law will be decisive, consistent, and fair, and a willingness to abide by legal outcomes even when they fall short of what

2. I use the term "neo" in neocultural to suggest that contemporary proposals for culture change interventions represent both a new form of law and development practice and a renewal of older approaches to development that associate transformations in individual consciousness with modernization and social change. See, e.g., Chantal Thomas, *Max Weber, Talcott Parsons and the Sociology of Legal Reform: A Reassessment with Implications for Law and Development*, 15 MINN. J. INT'L L. 383 (2006).

3. See JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 310-46 (2006); Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the "Rule of Law,"* 101 MICH. L. REV. 2275 (2003); Lan Cao, *Culture Change*, 47 VA J. INT'L L. 357 (2007); Jane Stromseth, *Post-Conflict Rule of Law Building: The Need for a Multi-Layered, Synergistic Approach*, 49 WM. & MARY L. REV. 1443, 1450-60 (2008); see also *infra* note 94.

4. See *infra* notes 95-100.

might be imagined possible through violence. Development professionals should, neocultural interventionists propose, install these ideas in ordinary individuals by directly teaching and promoting them. The predicted benefit is an increase in reliance on and compliance with the legal system.

I do not challenge these development ideals. Instead, I question the particular conceptualizations of culture that underlie them, and I explore the potential consequences of deploying these conceptualizations of culture as the basis of new development projects. Neocultural interventionists first configure culture as a mental domain. They think that culture is the values and beliefs that individuals in the field have about law and development—I call this *culture as consciousness*. They presuppose that local culture, in this sense, may be indifferent to the rule of law, and that it can be changed by their interventions to be permeated by a rule-of-law consciousness. I suggest that this conceptualization of culture as consciousness can produce significant limitations and forms of misrecognition: it can encourage development professionals to diagnose various problems of failed law as problems of failed consciousness; to (mis)identify actual people as lacking adequate legal consciousness; and to envision a relatively straightforward relationship between changing consciousnesses and changing behavior, when the desires people articulate and the practices they enact are far more paradoxical, contradictory, and contentious than this analysis would allow.

Neocultural interventionists also configure culture as a behavioral domain. They reason that conscious values and beliefs can produce a set of self-disciplining rules that shape individuals' behavior, their social relations, and their social practices in reasonably (although not uniformly) predictable ways. I call this *culture as lawlike rules*. Culture, in this second sense, is a grid of prescriptions guiding behavior. This imagines culture to be like law: culture is the set of lawlike rules that condition people to have respect for and comply with the rules of law themselves. I suggest this conceptualization of culture—constructed as the metalaw of law, if you will—is unlikely to remedy the indeterminacies and ineffectiveness of programs to promote the rule of law. Instead, it is likely to generate a new set of problems, or rather, revive old problems in new forms.

Anthropologists, who have long warned against using culture as a prescriptive tool of social change, are much more familiar with the limitations of both these conceptualizations of culture than lawyers.⁵ And it is to anthropologists that I turn in this Article for help in articulating them. I ask here: what cautions do they offer, and how do their ethnographically grounded accounts of culture suggest that lawyers should approach culture change projects? As we shall see, ethnographic analyses of development challenges suggest that local populations may be highly receptive to law but put law to surprising uses directly contrary to the rule-of-law agenda; they can set law against itself; they can use obedience to law and the legitimacy it bestows to sharpen conflict, promote local unrest, and mobilize violent social struggles. To understand what any "turn to culture" actually may have to grapple with, it may therefore be useful to complicate considerably the neocultural interventionist's picture not only of culture but also of law.

This Article, then, does not seek to pursue the familiar criticism of development interventions for imposing western

5. Many anthropologists have expressed caution about whether and how the concept of culture can be mobilized to change or improve other people's lives. For a few recent examples, see generally CHARLES L. BRIGGS WITH CLARA MANTINI-BRIGGS, *STORIES IN THE TIME OF CHOLERA: RACIAL PROFILING DURING A MEDICAL NIGHTMARE* (2003) (arguing against using an anthropological discourse of culture to inform institutional responses to a public health crisis in Venezuela); Sally Engle Merry, *Human Rights Law and the Demonization of Culture (And Anthropology Along the Way)*, POL. & LEGAL ANTHROPOLOGY REV., May 2003, at 55, 63 (2003) (warning against a "general tendency to culturalize problems," such as interpreting inequalities "in terms of cultural practices that suppress [women and minorities] rather than the economic or political problems their communities face"); Vilma Santiago-Irizarry, *Culture as Cure*, 11 CULTURAL ANTHROPOLOGY 3 (1996) (critically analyzing how medical professionals deployed the concept of culture to improve medical treatment of Hispanic patients); Susan Wright, *The Politicization of 'Culture'*, ANTHROPOLOGY TODAY, Feb. 1998, at 7, 11-12 (1998) (arguing against the ways in which management consultants are using anthropological ideas of culture to propose new flexible forms of organization and worker self-understandings). Anthropologists Ilana Gershon and Janelle Taylor in fact suggest that many contemporary anthropologists "have for the most part abandoned" the culture concept on the grounds that culture "produced the wrong kinds of generalizations, hid history and relations of power, escaped satisfactory definition, smuggled in assumptions about race and gender, and revealed an inaccurately simple and uniform bounded logic." Ilana Gershon & Janelle S. Taylor, *Introduction to "In Focus: Culture in the Spaces of No Culture,"* 110 AM. ANTHROPOLOGIST 417, 418 (2008) (internal citations omitted).

cultural values.⁶ Indeed, the culture change proposals I examine should not be dismissed on these grounds. Any development intervention is normative and non-neutral and, to their credit, neocultural interventionists are remarkable in their willingness to describe development not simply as a process of institutional reform, but rather as a cultural process aimed at constituting individual subjects themselves—here as legal subjects who want to be bound by the dictates of the rule of law.⁷ In order, then, to advance a discussion beyond a general normative preoccupation with whether culture change is itself a good or bad thing, I devote this Article to examining how a group of law professors propose to *use* culture as an analytic tool to produce programmatic knowledge about development beneficiaries and to fashion interventions in particular local contexts with the aim of strengthening law. I do so in order to encourage critical reflection on the relation between the prescriptive deployment of culture, on the one hand, and actual development challenges in specific social, historical, and political contexts, on the other hand.

In Part I of this Article, I trace the role of culture in law and development beginning in the 1960s and 1970s, with the first wave of reforms, and then I examine contemporary scholarship in order to set forth the relations among law,

6. For examples of scholarship that do pursue this argument, see Mohan Gopalan Gopal, *Law and Development: Toward a Pluralist Vision*, 90 AM. SOC'Y INT'L L. PROC. 231, 233 (1996) ("[T]he law and development movement should set as its main objective the protection of the freedom of states and people to choose their social and cultural norms and values (including their legal systems) in accordance with rules of international law. . . . It should not be the vehicle for promotion of any particular set of national cultural and social norms.") (footnote omitted); Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201, 207 n.25 (2001) ("What is needed is not the imposition of a single culture's template of human dignity but rather the mining of all cultures to craft a truly universal human rights corpus.").

7. For example, Brooks writes, "It should go without saying that the project of intervening in 'other' cultures in order to change and 'improve' them is a fundamentally arrogant and imperialist project, with many pitfalls. Nonetheless, I do not think it is a project we can abandon" Brooks, *supra* note 3, at 2339. Cao writes, "My proposal to go beyond law and modernizing law to culture and culture change will undoubtedly smack some of Orientalism. . . . [P]romoting cultural attributes that would facilitate the establishment of a liberal market society [will be suspect for some law and development scholars]." Cao, *supra* note 3, at 379.

culture, and ordinary people that the culture concept encodes in the neocultural interventionist project. In Part II, I argue that neocultural interventionists deploy a conceptualization of culture paradoxically analogous to the conceptualization of law that the turn to culture was meant to correct. In the 1980s and 1990s, a second wave of reformers envisioned law as an explicit set of social rules capable of shaping social practices in reasonably predictably ways. When transplanting law imagined in this way into the developing world proved sometimes futile or counterproductive, neocultural interventionists recommended fixing the culture—and imagined culture, like law, as an explicit set of social rules capable of shaping social practices in reasonably predictably ways. Neocultural interventionists thus analogized the societies they sought to reform to, quite literally, the minds of ordinary individuals in those societies—for them, *both* societies and minds became subject to the rule of law.

In Part III, I illustrate some of the descriptive limitations and even prescriptive dangers of relying on an image of culture that tracks so closely the rule-of-law image of law, by drawing on two suggestive ethnographic examples from Nepal—a country that by virtually all accounts lacks robust governance by the rule of law and that has been the recipient of significant rule-of-law development funding. The first example involves people demanding, through street protest, that the state allocate risk and oversee compensation for injuries resulting from everyday traffic accidents. The second example involves village women who have cast their lot with Maoist insurgents in order to achieve, as they claim, values such as equality and social justice. Neither the street protesters nor the village women lack belief in law or development; instead both are avid promoters of law and development. These examples all involve people who profess the kinds of values and beliefs that rule-of-law aid practitioners wish to instill, yet who nonetheless behave in ways that befuddle rule-of-law ends, and whose desires, values, and beliefs have done little, it appears, to actually produce the rule of law in institutionally cognizable forms. If the street protesters and village women simply lacked belief in law or development, then converting them to new ideological positions consistent with the rule of law might appear more straightforward.

I conclude by suggesting that the turn to culture in law and development is an effort to enable ordinary citizens to instill within themselves normative desires for particular configurations of modern legal rules, processes, and institutions. This may be a compelling way to envision development: empowering individuals from the bottom-up to embrace and embody institutional reform through culture change. But, as my examples from Nepal suggest, this vision, at least when abstracted from ethnographic description, can remain strikingly disconnected from the politics and conflict of everyday life.

I. THE CULTURE CONCEPT IN LAW AND DEVELOPMENT

A. *A Brief Historical Overview*

Culture was a core analytical concept of the (now retronym) “first-wave” law and development movement when U.S. legal scholars talked about the cultural attitudes of their third world legal counterparts, and regarded them as objects and agents of change. In the 1960s and 1970s, first-wave scholars labored to introduce third world legal elites to the ideals and instrumental reasoning of American legal realism. Working in Latin America and Africa with grants from western foundations and universities, these scholars believed that law could be used as a means to advance state-led economic growth.⁸ A key obstacle, as they understood it, was that third world legislators, lawyers, judges, and law professors had been enculturated to hold a set of attitudes, beliefs, and expectations about law marked by a high degree of formalism. As a result, these third world actors produced, defended, and expounded upon laws by referencing abstract and rigid internal rules that were out of touch with social needs and that were, consequently, often ignored. As first-wave law and development scholars perceived it, this state of affairs was paradigmatically not modern.⁹

8. David M. Trubek, *The “Rule of Law” in Development Assistance: Past, Present, and Future*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 74, 75 (David M. Trubek & Alvaro Santos eds., 2006).

9. For scholarship analyzing the influences of modernization theory on first-wave law and development, see Lan Cao, *Law and Economic Development: A*

Because first-wave scholars reasoned that economic development could flow from the achievement of an "anti-formal, 'rule-skeptical'" instrumentalist legal culture,¹⁰ producing modern legal subjects via projects of culture change was among their central aims. In David Kennedy's telling: "Blind rule following and unimaginative bureaucratic habits were preventing law in the books from realizing its potential in action. The solution was to build a more pragmatic and antiformalist local legal culture . . ."¹¹ Or, in David Trubek's summary, "the most important thing to do was to create a new, more instrumental *legal culture*."¹²

A key metaphor of the times was the lawyer as social engineer.¹³ First-wave scholars aimed to create legal professionals trained to inquire about social and economic needs and interests and to fashion laws that could mediate and advance those needs and interests on the ground.¹⁴ In this sense, the model of culture change that first-wave scholars exported involved encouraging particular ways of thinking about law as a set of problem-solving techniques, and, more literally, as the very set of techniques that could

New Beginning?, 32 TEX. INT'L L.J. 545, 546-51 (1997) (book review); Brian Z. Tamanaha, *The Lessons of Law-and-Development Studies*, 89 AM. J. INT'L L. 470, 471-76 (1995) (review article). See also Tom Ginsburg, *Does Law Matter for Economic Development? Evidence from East Asia*, 34 LAW & SOC'Y REV. 829, 831 (2000) (review essay).

10. JAMES A. GARDNER, LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA 4 (1980); see also David M. Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L.J. 1, 7-8 (1972).

11. David Kennedy, *The "Rule of Law," Political Choices, and Development Common Sense*, in THE NEW LAW AND ECONOMIC DEVELOPMENT, *supra* note 8, at 95, 112.

12. Trubek, *supra* note 8, at 76.

13. For the origins of this metaphor, see Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence* (pt. 3), 25 HARV. L. REV. 489 (1912). See also Dennis O. Lynch, *Hundred Months of Solitude: Myth or Reality in Law and Development?*, 1983 AM. B. FOUND. RES. J. 223, 236-37 (review essay) (discussing Karl Llewellyn's "portrait of the lawyer as social engineer").

14. See, e.g., John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457, 465-66 (1977); see also Elliot M. Burg, *Law and Development: A Review of the Literature & a Critique of "Scholars in Self-Estrangement,"* 25 AM. J. COMP. L. 492, 505-06 (1977); Trubek, *supra* note 10, at 38.

be used to promote economic growth.¹⁵ To that end, in 1971, a group of law professors funded by the United States Agency for International Development (USAID) initiated an ambitious research project to study, among other things, the relationship between culture and legal change.¹⁶ Mining newspapers and legal periodicals in six nations beginning at the end of World War II, they examined “legal culture” or what they described as the attitudes that legal elites as well as ordinary individuals held towards law. They aimed to make these attitudes explicit and knowable through empirical study and then to plot these variables in relation to each other and in relation to legal systems and social change over time.¹⁷

Many scholars have studied the effects of this movement, and by various accounts these effects were both too generative and not generative enough. As Trubek explains: “In some cases, the transplants did not ‘take’ at all: some of the new laws promoted by the reformers remained on the books but were ignored in action. In others, laws were captured by local elites and put to uses different from those the reformers intended.”¹⁸ Some of the movement’s early pioneers therefore replaced their confidence in exporting an anti-formalist legal culture with consideration of a host of other contextual factors. For example, some scholars became concerned that fostering a cultural understanding of law as an instrument could, in political contexts that lack robust democratic participation, transform law into the handmaiden of authoritarian governments.¹⁹ These scholars also questioned the

15. On literalization or “the transformation of a metaphor into an object,” see Annelise Riles, *A New Agenda for the Cultural Study of Law: Taking on the Technicalities*, 53 *BUFF. L. REV.* 973, 1009, 1021-24 (2005).

16. See JOHN HENRY MERRYMAN, DAVID S. CLARK & LAWRENCE M. FRIEDMAN, *LAW AND SOCIAL CHANGE IN MEDITERRANEAN EUROPE AND LATIN AMERICA: A HANDBOOK OF LEGAL AND SOCIAL INDICATORS FOR COMPARATIVE STUDY* at v-vi, 27-29 (1979); John Henry Merryman, *Law and Development Memoirs II: SLADE*, 48 *AM. J. COMP. L.* 713, 722-24 (2000).

17. Merryman, *supra* note 16, at 723-24.

18. Trubek, *supra* note 8, at 78-79.

19. See Trubek, *supra* note 10, at 19-21; see also GARDNER, *supra* note 10, at 101, 118, 271-75; David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 *WIS. L. REV.* 1062, 1076.

ethnocentricity (and efficacy) of projects to transform the ways in which foreign legal elites understood law, particularly in light of little visible reform.²⁰ In addition to attacking the first-wave movement's cultural approach, a number of Left scholars also attacked the movement's cultural critique from the perspective of the international political economy. These critical theorists called for attention to the ways in which law and development itself promoted global economic relations to the detriment of third world states.²¹ For example, Francis Synder criticized James Gardner for relying on cultural explanations ("American ethnocentrism," "flawed [American] legal models," "resistance of Latin American legal culture") to make sense of the movement's failures, rather than examining the relations among the law and development movement, existing patterns of dependency, and the dynamics of global capitalism.²² By the mid-1970s, however, the movement largely dissipated on its own accord. As Trubek explains, "[T]here was disillusion in the academy, foundation interest declined, and the official aid agencies showed no interest in moving into legal reform. So, for the moment, the [law and development] movement seemed to

20. See, e.g., Merryman, *supra* note 16, at 459-60, 479-81; Trubek & Galanter, *supra* note 19, at 1063-64, 1080. See generally GARDNER, *supra* note 10.

21. See, e.g., David F. Greenberg, *Law and Development in Light of Dependency Theory*, 3 RES. L. & SOC. 129, 131, 136-38 (1980); Francis G. Snyder, *Law and Development in the Light of Dependency Theory*, 14 LAW & SOC'Y REV. 723 (1980); Francis G. Snyder, *The Failure of "Law and Development"*, 1982 WIS. L. REV. 373, 390 [hereinafter *Failure of "Law and Development"*] (reviewing GARDNER, *supra* note 10). Some of these scholars turned to international law to argue that developed states owed a set of obligations to developing states. A good example of this trajectory can be found in Anthony Carty's 1992 edited volume, *LAW AND DEVELOPMENT* at v-vi (Anthony Carty ed., 1992). Carty juxtaposes 1970s articles organized under the heading, "Law and Modernisation: The Legal Imperialism Debate," with 1980s articles under the headings "The Debate About the Right to Development as a Human Right . . ." and "International Law and Development." *Id.* Scott Newton notes the irony: "Oddly enough, given the Marxian, materialist pretensions of [these critical] theorists, the right to development all but reverses the law/economy polarity, subordinating economic logic and the relations of production to legal logic, and rights logic at that." Scott Newton, *The Dialectics of Law and Development, in THE NEW LAW AND ECONOMIC DEVELOPMENT*, *supra* note 8, at 174, 186; see also Cao, *supra* note 9, at 556; Tamanaha, *supra* note 9, at 479.

22. See *Failure of "Law and Development"*, *supra* note 21, at 390; see also Greenberg, *supra* note 21, at 131, 136-38.

have run out of steam.”²³

For a variety of reasons that are both well-studied and beyond the scope of this Article, in the late-1980s exporting law abroad became a good idea again—and at a scale “far eclipsing even the wildest dreams of the [first-wave law and development] pioneers.”²⁴ Suffice it to say that two simultaneous forces—“the project of markets” and “the project of democracy”—converged in that period around their support for strong legal institutions.²⁵ The markets project championed legal institutions to achieve stable legal environments attractive to foreign investors; the democracy project sought to achieve national enforcement of civil, political, and human rights, and it was widely thought that they could both proceed in tandem.²⁶ To that end, the rule-of-law aid community adopted a standard set of institution-building activities aimed at upgrading judiciaries, law enforcement, legal education, and commercial and criminal law.²⁷

Scholars reflecting upon this second-wave period have characterized its approach to law reform as “formal.”²⁸ Neocultural interventionist scholars, in particular, have criticized second-wave reformers for placing excessive faith in the simple idea that the establishment of a correct set of

23. Trubek, *supra* note 8, at 78.

24. *Id.* at 81.

25. *Id.* at 84.

26. *See id.* at 84-85. Thomas Carothers similarly credits the expansion of rule-of-law promotion to the “irresistible apparent connection of the rule of law with the underlying goals of market economics and democracy that now constitute the dual foundation of contemporary international aid.” Thomas Carothers, *The Problem of Knowledge, in* PROMOTING THE RULE OF LAW ABROAD 15, 27-28 (Thomas Carothers ed., 2006).

27. *See* CAROTHERS, *supra* note 1, at 165-69.

28. For example, David Kennedy describes how second-wave reformers aspired to establish the correct set of rules and private rights to facilitate market activity (bolstered by judicial enforcement of these rules and rights). Kennedy, *supra* note 11, at 138-42. Although Kennedy notes that this approach also included instrumental policy analysis, he contrasts it with “the pragmatic and flexible antiformalism” of the first-wave movement. *Id.* at 141. Trubek similarly observes that “[i]ronically, both the market builders and the democracy promoters showed a faith in formalism,” for example, that judges could “resolve all questions without resort to ideology, politics, or even policy-oriented balancing,” even as both promoted “instrumental thought and greater sensitivity to policy concerns.” Trubek, *supra* note 8, at 85-86.

forms (or rules or institutions) would naturally produce a desired set of social norms²⁹—a faith that, as Scott Newton observes, “is actually rather curious, given the extent to which legal formalism had long since been subjected to a wide variety of critiques” (including critiques by first-wave law and development scholars themselves).³⁰ What I find most striking about this second-wave period, however, is that the first-wave idea of culture as an analytic construct with which the law and development community felt compelled to think had all but receded from the scene. Tom Ginsberg, for example, notes that the first wave’s “emphasis on cultural factors” was supplanted by the second wave’s emphasis on “technical institutional arrangements,”³¹ and Kerry Rittich observes, “against politics and culture, law [was] identified with efficient markets.”³²

Nothing requires us to distinguish law as a set of forms, instruments, and techniques from law as a product of culture. However, as Annelise Riles suggests, drawing this distinction can be symptomatic of the ways in which legal scholars construct knowledge about law.³³ If we indeed tend to distinguish between these two broad understandings of law, then perhaps it is unsurprising that, in the wake of mounting evidence that institutionally grounded and “formal” projects of law reform were failing to achieve their intended effects,³⁴ law and development scholars and

29. See, e.g., Brooks, *supra* note 3, at 2284 (“[R]ule-of-law promotion efforts continue to focus on establishing the formal dimensions of the rule of law, assuming with little evidence that this will lead reliably and predictably to the emergence of a robust societal commitment to the more substantive aspects of the rule of law.”); see also Cao, *supra* note 3, at 369-70.

30. Newton, *supra* note 21, at 190-91.

31. Ginsburg, *supra* note 9, at 833.

32. Kerry Rittich, *Who's Afraid of the Critique of Adjudication?: Tracing the Discourse of Law in Development*, 22 CARDOZO L. REV. 929, 934 (2001).

33. See Riles, *supra* note 15, at 973-74.

34. See, e.g., Carothers, *supra* note 26, at 28 n.5 (citing a USAID review of its rule-of-law programs, Harry Blair & Gary Hansen, *Weighing in on the Scales of Justice: Strategic Approaches for Donor-Supported Rule of Law Programs*, USAID Program and Operations Assessment Report No. 27, Feb. 1994); see also Garth, *supra* note 1, at 384. Garth cites several studies, including: LINN A. HAMMERGREN, *THE POLITICS OF JUSTICE AND JUSTICE REFORM IN LATIN AMERICA: THE PERUVIAN CASE IN COMPARATIVE PERSPECTIVE* (1998); LAWYERS COMM. FOR HUMAN RIGHTS & VENEZUELAN PROGRAM FOR HUMAN RIGHTS EDUCATION AND ACTION, *HALFWAY TO REFORM: THE WORLD BANK AND THE VENEZUELAN JUSTICE*

practitioners again turned to cultural vocabularies as a means of catalyzing change. Some emphasized a “will to reform” in mostly general terms.³⁵ Others called for more nuanced and context-specific examinations of law in minds, so to speak. For example, Thomas Carothers, founder and director of the Democracy and Rule of Law Project at the Carnegie Endowment for International Peace, writes:

Clearly law is not just the sum of courts, legislatures, police, prosecutors, and other formal institutions with some direct connection to law. Law is also a normative system that resides in the minds of the citizens of a society. As rule-of-law providers seek to affect the rule of law in a country, it is not clear if they should focus on institution building or instead *try to intervene in ways that would affect how citizens understand, use, and value law*.³⁶

Along these lines, some contemporary law and development scholars and practitioners have turned away from state-focused institutional reforms and towards development interventions that are more local in scale and more concerned with how ordinary individuals experience law in their everyday lives. To that end, a growing number now champion projects of “legal empowerment”—what Vivek Maru describes as a shift from aiding “state

SYSTEM (1996); Linn Hamnergren, *Do Judicial Councils Further Judicial Reform? Lessons from Latin America* (Carnegie Endowment for Int'l Peace, Rule of Law Series, Democracy and Rule of Law Project, Working Paper No. 28, 2002), available at <http://www.carnegieendowment.org/files/wp28.pdf>; Human Rights First, *Building on Quicksand: The Collapse of the World Bank's Judicial Reform Project in Peru*, Apr. 2000, available at <http://www.humanrightsfirst.org/pubs/descriptions/perubuilding.htm>.

35. See Carothers, *supra* note 26, at 22 (“The sobering experience with the early wave of efforts to promote institutional change produced . . . a great deal of attention to what quickly came to be called ‘will to reform.’”). Rachel Kleinfeld similarly describes a phenomenon among aid practitioners who “often talk about the importance of finding ‘political will’ for rule-of-law reforms.” Rachel Kleinfeld, *Competing Definitions of the Rule of Law*, in PROMOTING THE RULE OF LAW ABROAD, *supra* note 26, at 31, 35; see also Garth, *supra* note 1, at 384 (“The lack of success is also attributed frequently to a lack of political will, requiring more ‘stakeholders’ in the judiciary or government, [and] more monitoring and pressure from ‘civil society’ . . .”).

36. Carothers, *supra* note 26, at 20 (emphasis added). Jennifer Beard describes Carothers’ analysis as “a call to examine rule of law development as a disciplinary practice aimed at constituting subjects willing to accept . . . Western liberal democratic values.” Jennifer Beard, *The Confessional Framework of Rule of Law Development: How to Offer Salvation to Willing Legal Subjects*, 75 NORDIC J. INT’L L. 409, 411 (2006).

institutions" to "directly assisting ordinary people, especially the poor,"³⁷ and what Stephen Golub recommends as a mainstream "alternative to the problematic, state-centric rule-of-law orthodoxy," which strengthens civil society actors to engage proactively with government agencies.³⁸ This emphasis, moreover, has clear analogues in programmatic literature: the Asian Development Bank, for example, now recommends bottom-up legal empowerment as a means of increasing "the control that disadvantaged populations exercise over their lives" and imparting "critical consciousness' . . . [to] women, the poor, and other marginalized groups."³⁹ The Bank, in fact, reasons that transformations in individual consciousness will generate "higher-level institutional and procedural reforms . . . by mobilizing collective capacity and demand."⁴⁰

This emphasis on the ordinary poor as agents of legal change has converged with the contemporary turn to culture.⁴¹ Neocultural interventionists reason that

37. Vivek Maru, *Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide*, 31 YALE J. INT'L L. 427, 428 (2006).

38. Stephen Golub, *The Legal Empowerment Alternative*, in PROMOTING THE RULE OF LAW ABROAD *supra* note 26, at 161, 161-62. For other examples of law and development scholars and projects that express ethical and pragmatic sensibilities in favor of localism, decentralization, and bottom-up stakeholder participation, see Richard Cameron Blake, *The World Bank's Draft Comprehensive Development Framework and the Micro-Paradigm of Law and Development*, 3 YALE HUM. RTS. & DEV. L.J. 159 (2000); Steven D. Jamar, *A Lawyering Approach to Law and Development*, 27 N.C. J. INT'L L. & COM. REG. 31 (2001); Thomas F. McInerney, *Law and Development as Democratic Practice*, 38 VAND. J. TRANSNAT'L L. 109 (2005).

39. ASIAN DEV. BANK, LAW AND POLICY REFORM AT THE ASIAN DEVELOPMENT BANK 7 (2001), available at http://www.adb.org/documents/others/Law_ADB/lpr_2001.pdf. Cf. COMM'N ON LEGAL EMPOWERMENT OF THE POOR, MAKING THE LAW WORK FOR EVERYONE: VOLUME 1 (2008), available at <http://www.undp.org/legalempowerment/reports/concept2action.html> (describing legal empowerment of the poor as a development strategy).

40. ASIAN DEV. BANK, *supra* note 39, at 8-9.

41. Development organizations today increasingly champion ordinary individuals as catalysts of legal, social, and economic change—responsible for both monitoring and producing a range of development ideals. The World Bank's Comprehensive Development Framework (CDF) is a good example. The Bank emphasizes participatory processes, "holistic" bottom-up development priorities, and public-private partnerships. World Bank, *Comprehensive Development Framework*, <http://go.worldbank.org/O3CN35INY0> (last visited Mar. 31, 2009). Some scholars see this turn to civil society and the ordinary poor

transplanted law and legal institutions stand outside culture and cannot achieve their intended effects without the “culture” of law’s ordinary users. Culture thus appears as a tool to take law—formal and acultural—and to translate it into something that is specific, local, embedded in individual consciousness, and hence powerful.

Thus, on the one hand, the contemporary turn to culture may reflect a recurring effort within law and development to use culture to correct approaches to law that seem too formal. On the other hand, changing ideas about law and development itself significantly shift the image of culture and the ends to which it is recruited in development policy. First-wave reformers viewed culture change primarily as a project of transforming how third world legal elites thought about law in order to encourage a less formalist and more instrumental approach. The ultimate aim of first-wave culture change projects was to enable legal elites to envision and use law instrumentally as a tool to produce economic growth.⁴² By contrast, neocultural interventionists do not describe formality as an anachronistic way of thinking about law—that is, as a set of internally coherent legal forms disconnected from the promotion of particular policy ends. Rather, they describe formality as a set of legal forms disconnected from *culture*, or, more accurately, they describe formality as legal forms disconnected from ordinary people who believe these forms

as a means to “fill the vacuum left by the restructuring of the welfare state mandated by economic liberalization processes in countries around the world.” KATHARINE NEILSON RANKIN, *THE CULTURAL POLITICS OF MARKETS: ECONOMIC LIBERALIZATION AND SOCIAL CHANGE IN NEPAL* 22 (2004). For critical assessments of some of these efforts, see Julia Paley, *The Paradox of Participation: Civil Society and Democracy in Chile*, 24 *POL. & LEGAL ANTHROPOLOGY REV.* 1 (2001) (describing how development ideas of civil society, local empowerment, and local participation were used to justify reductions in public expenditures for social services in democratic Chile). See also JUDE HOWELL & JENNY PEARCE, *CIVIL SOCIETY AND DEVELOPMENT: A CRITICAL EXPLORATION* (2001) (exploring, through extensive case studies, the politics, relations of power, and both regressive and progressive possibilities that can flow from development efforts to strengthen civil society).

42. See, e.g., Trubek, *supra* note 10, at 8 (describing reasoning prevalent during the first-wave movement: “The more law becomes a mechanism or an instrument to advance rationally toward specified goals, the more effective it will become. This will be achieved, it is argued, only if the legal culture embraces an instrumental conception of law which fosters the clarification of economic goals and their relationship to the legal system.”).

have power.⁴³

One consequence of this shift is that contemporary culture change projects envision a more tentacular reach into the population—a shift in agents from third world elite judges, lawyers, and legislators to virtually everyone. This new ambition likely also reflects the expansive role that law now plays in development discourse writ large. Law, as many others have noted, is no longer simply a means to produce economic growth.⁴⁴ As Amartya Sen famously argued, “even if legal development were not to contribute one iota to economic development . . . even then legal and judicial reform would be a critical part of the development process.”⁴⁵ Law today is its own end of development, and ordinary people are now a means *and* end of achieving development directly. And culture offers the promise—or at least that evidence—that rule-of-law promotion has been made internal or, as Peter Fitzpatrick aptly puts it, that law can “regulate [its subjects] from the inside.”⁴⁶

Hence, my descriptive claim is this: for contemporary

43. See generally *infra* Part I.B.

44. Of course, there is now a significant literature that debates the relation between law and economic growth. For a few important contributions, see generally LAW, CAPITALISM AND POWER IN ASIA: THE RULE OF LAW AND LEGAL INSTITUTIONS (Kanishka Jayasuriya ed., 1999); KATHARINA PISTOR & PHILIP A. WELLONS, THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT 1960-1995 (1999); Richard E. Messick, *Judicial Reform and Economic Development: A Survey of the Issues*, 14 WORLD BANK RES. OBSERVER 117 (1999); Frank Upham, *Mythmaking in the Rule of Law Orthodoxy* (Carnegie Endowment for Int'l Peace, Rule of Law Series, Democracy and Rule of Law Project, Working Paper No. 30, 2002), available at <http://www.ciaonet.org/wps/upf01/upf01.pdf>.

45. Amartya Sen, World Bank Legal Conference on Comprehensive Legal and Judicial Development, What is the Role of Legal and Judicial Reform in the Development Process?, Washington, D.C., June 5, 2000, available at <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/legalandjudicial.pdf>, quoted in Alvaro Santos, *The World Bank's Uses of the "Rule of Law" Promise in Economic Development*, in THE NEW LAW AND ECONOMIC DEVELOPMENT, *supra* note 8, at 265. Or as David Kennedy explains, summarizing the shift in thinking that Sen's arguments helped to propel: “Increasingly, law—understood as a combination of human rights, courts, property rights, formalization of entitlements, prosecution of corruption, and public order—came to define development.” Kennedy, *supra* note 11, at 157.

46. Peter Fitzpatrick, “The damned word”: Culture and Its (In)compatibility with Law, 1 LAW, CULTURE, & HUMAN. 2, 11 (2005) (quoting TERRY EAGLETON, THE IDEA OF CULTURE 50 (2000)).

law and development scholars and practitioners who invoke its power, culture is imagined to function as an analytic tool to make law internal to ordinary individuals and to make individuals capable of bringing their interests, desires, and consciousness in line with rule-of-law ends. I therefore focus in the following Part on how the proponents of this strategy use culture—not as an object of academic study to explain differences among contexts,⁴⁷ or even necessarily as something that is out there in the world that must be taken into account⁴⁸—but rather as a mechanism of enlisting ordinary individuals to promote, but more specifically to embody, development understood as the rule of law.

B. *The Neocultural Interventionist Project*

Perhaps the most important contemporary innovator of what I have termed the neocultural interventionist project is Rosa Ehrenreich Brooks. In 2003, building on what I will now shorthand as the failed law reform thesis, Brooks argued that the standard menu of rule-of-law assistance—“reforming institutions,” “rewriting laws,” “upgrading the legal profession through support for stronger bar associations and law schools,” and “increasing legal access and advocacy”—predictably fails to produce its intended effects.⁴⁹ The reason why, she offered, rests on the failure of

47. Of course, there is that too. See, e.g., Amir N. Licht et al., *Culture Rules: The Foundations of the Rule of Law and Other Norms of Governance*, 35 J. COMP. ECON. 659 (2007) (presenting empirical evidence to argue that cultural difference among nations accounts for significant variation in the adoption of rule-of-law norms); Amanda J. Perry, *The Relationship Between Legal Systems and Economic Development: Integrating Economic and Cultural Approaches*, 29 J.L. & SOC’Y 282, 286-87 (2002) (arguing that variations in cultural values may confound prescriptions for legal reform that emphasize the market rather than the state in allocating economic resources and that emphasize formal legal rules rather than discretionary standards in establishing the procedures for legislating and enforcing law).

48. See, e.g., WORLD BANK, INITIATIVES IN LEGAL AND JUDICIAL REFORM 16 (2004) (“Wholesale importation of foreign laws cannot take root when the laws are alien to the culture and values of the people.”).

49. Brooks, *supra* note 3, at 2284-85 (quoting the “Rule-of-Law Assistance Standard Menu” in CAROTHERS, *supra* note 1, at 168); see also *Conceiving a Just World Under Law: A Panel Summary*, 98 AM. SOC’Y INT’L L. PROC. 125, 126-29 (2004) (recording remarks by Rosa Ehrenreich Brooks at the Ninety-Eighth Annual Meeting of the American Society of International Law (Mar. 31-Apr. 2, 2004)).

the rule-of-law aid community to attend to the relation between law and culture:

[C]reating the rule of law is most fundamentally an issue of norm creation. The rule of law is not something that exists "beyond culture" and that can be somehow added to an existing culture by the simple expedient of creating formal structures and rewriting constitutions and statutes. In its substantive sense, the rule of law is a culture, yet the human-rights-law and foreign-policy communities know very little—and manifest little curiosity—about the complex processes by which cultures are created and changed.⁵⁰

Brooks' overarching argument is rooted in the premise that law and culture are mutually constitutive. Think about law without also thinking about culture—precisely the mistake that second-wave rule-of-law promoters were making—and law is unlikely to work as it should: "rule-of-law promotion efforts have been disappointing in large part because they don't take enough account of norms and culture."⁵¹ To illustrate the point, Brooks described how, in 1999, the UN Mission in Kosovo expediently reinstated Serb-promulgated law, subject to the proviso that it complied with international human rights standards.⁵² Brooks reports that even though the contents of these laws were "decent," the Mission's protracted unwillingness to accommodate Albanian opposition to Serb-promulgated law, combined with the Mission's ultimate reversal of its choice-of-law decision, diminished ordinary Albanians' perception of the legitimacy, and hence the value of following, Mission-instilled law.⁵³ "This is a small example," Brooks writes, "of how an overly formalistic approach to law foundered when it came up against certain 'irrational' but powerful cultural understandings."⁵⁴

Simply put, Brooks' claim is that law cannot work

50. Brooks, *supra* note 3, at 2285. Brooks defines culture as "the widely shared myths, assumptions, behavioral patterns, customs, rituals, and social and historical understandings of a group." She defines norms as "widely shared attitudes and their associated behavioral imperatives." *Id.* at 2286 n.50.

51. *Id.* at 2322.

52. *Id.* at 2291-93.

53. *Id.* at 2293.

54. *Id.*

without a cultural precondition—namely, a large number of people who believe in its value. This argument revives Lawrence Friedman’s intervention in first-wave law and development scholarship. In 1969, Friedman argued, against a functionalist definition of modern law, that the critical distinction between traditional law and its modern counterpart was a “cultural distinction” made evident through a popular belief in law’s rationality.⁵⁵ Not that modern law really is rational—it is not, Friedman argued—but rather that modern legal subjects believe that law is, should be, and can be rationally calculated to achieve knowable ends.⁵⁶ According to Friedman, modernity and modern law are, in no small part, a state of mind. Brooks sounds like (a latter-day) Friedman when she asserts that “when people already believe law matters, it will matter; when people think law doesn’t matter, it never can.”⁵⁷

To persuade people to believe that law matters, Brooks emphasizes practical questions of technique:⁵⁸ “How do you change norms effectively?”⁵⁹ What methods (e.g., interventions in “nonlegal myths and stories, customs and rituals, habits and assumptions, and patterns of interaction”) should the practitioner use?⁶⁰ When should the practitioner focus on elites versus the grassroots?⁶¹ This emphasis on technique stems from a gap she identifies in U.S. legal scholarship: there is little exploration or advice,

55. Lawrence M. Friedman, *On Legal Development*, 24 *RUTGERS L. REV.* 11, 27, 29 (1969).

56. Friedman writes:

It is not clear that modern law, as a whole, is more rational in this sense than ancient law. . . . [But] the basis of legitimacy—a cultural fact—has changed. People of the modern world look upon law as a tool, an instrument, not as an object of tradition or sentiment, as sacred, as an end in itself, or as a direct emanation from the Divine.

Id. at 29-30.

57. Brooks, *supra* note 3, at 2301.

58. Brooks suggests that the question of “what precisely are the norms that underlie a substantive commitment to the rule of law, and that can thus enable formal law to be an effective mechanism for further cultural change and adaptation” is “primarily a question for the philosophers among us.” *Id.* at 2323, 2324.

59. *Id.* at 2328.

60. *Id.* at 2324, 2338.

61. *Id.* at 2324.

she suggests, on the prescriptive “question of how purposive governmental or nongovernmental norm-creation projects might actually work.”⁶²

In a 2006 book, *Can Might Make Rights?: Building the Rule of Law After Military Interventions*, co-authored with Jane Stromseth and David Wippman, Brooks ventures a set of working prescriptions for “foreign policy, military, and humanitarian professionals” in post-conflict settings “to create a rule of law culture, one in which a reasonably large percentage of people *come to believe in the value of* legal institutions.”⁶³ Because the “rule of law is as much a culture as a set of institutions, as much a matter of the habits, commitments, and beliefs of ordinary people as of legal codes,”⁶⁴ Brooks and her coauthors argue that rule-of-law practitioners should aspire to create “substantive commitment[s] to the values underlying the rule of law.”⁶⁵ These values include substantive ideals such as respect for minority and women’s rights as well as procedural ideals such as respect for “the orderly and nonviolent resolution of disputes and a willingness to be bound by the outcome of legal rules and processes.”⁶⁶ In this sense, Stromseth, Wippman, and Brooks argue that a project of changing individual consciousness—that is, “[p]ersuading people to believe in the rule of law”—underlies law in any of its substantive or procedural manifestations.⁶⁷

62. *Id.* at 2325.

63. STROMSETH, WIPPMAN, & BROOKS, *supra* note 3, at 17, 311 (emphasis added).

64. *Id.* at 310.

65. *Id.* at 15.

66. *Id.* at 75.

67. *Id.* at 311. In a later article, Stromseth summarizes the point as follows:

Especially important is the need to focus on the perceptions of ordinary citizens and to strengthen cultural commitments to the very idea of the rule of law. . . . Although institutions and codes are an important part of the picture, for the rule of law to exist, people must also believe in the value and efficacy of legal institutions as a means of resolving disputes. . . . Getting people to believe in the rule of law is very complex. . . . [I]t . . . involves grappling with complex issues of how cultures change and creating rule of law programs that foster cultural change.

Stromseth, *supra* note 3, at 1450-51 (2008) (citations omitted) (describing STROMSETH, WIPPMAN & BROOKS, *supra* note 3, at 179, 310-11). *See also* Jane

To that end, they propose interventions that are local in scale and aim to “reach rural citizens, the poor, the disempowered, and the disaffected” to spread legal information, skills, and values.⁶⁸ For example, rule-of-law practitioners could develop “programs that seek to empower women,” which, in turn, “can have spillover effects on economic development and peace-related initiatives.”⁶⁹ Or they could support paralegals and mediators who “pressure for reform,”⁷⁰ and “empower local reformers to change traditional norms.”⁷¹ “Programs that seek more broadly to educate nonelites about law, human rights, and governance,” Stromseth, Wippman, and Brooks argue, “can have significant spillover effects on more traditional justice sector programs.”⁷²

Development programs that start with culture thus allow the development practitioner to gain access to ordinary individuals’ understandings of and engagements with law; to lead these individuals to change these understandings and relations; and hence to change law itself. Stromseth, Wippman, and Brooks thus offer a powerful bottom-up imaginary: an idea that national transformations can reflect local ones and that individual actors are themselves capable of generating norms and potentially also “responsible for the spread and dispersal of these [norms] through their ongoing practices and activities.”⁷³ And they offer a market metaphor to explain

Stromseth, *Strengthening Demand for the Rule of Law in Post-Conflict Societies*, 18 MINN. J. INT’L L. 415 (2009).

68. STROMSETH, WIPPMAN, & BROOKS, *supra* note 3, at 315-16 (emphasis omitted).

69. *Id.* at 344 (emphasis omitted).

70. *Id.* at 339.

71. *Id.* at 337.

72. *Id.* at 341 (emphasis omitted). More generally, they propose development projects that include strengthening supportive civil society institutions, shoring up legal education, linking formal legal institutions to customary dispute resolution practices, transferring law-related skills to non-lawyers such as paralegals and trained mediators, offering conflict resolution services such as mediation as an alternative to formal dispute resolution institutions, targeting younger generations, women, and minorities, and linking rule-of-law projects to other development projects such as agrarian reform or micro-finance. *See id.* at 330-45.

73. Gráinne de Búrca, *EU Race Discrimination Law: A Hybrid Model?*, in LAW AND NEW GOVERNANCE IN THE EU AND THE US 97, 98 (Gráinne de Búrca &

how a bottom-up trajectory could unfold: they suggest that legal institutions are beholden and responsive to the preferences and demands of individual consumers. "With citizens more aware of their rights and options," they write, "traditional authorities may face greater incentives to offer reasonable dispute settlement arrangements if they wish to continue to attract customers for their services."⁷⁴

Lan Cao offers a strikingly similar account of culture, this time tethered more to the end of economic development than of the rule of law. Cao's argument is blunt and straightforward: law and development practitioners should "pursue the objective of purposive culture change."⁷⁵ Like Brooks, Cao begins with the failed law reform thesis and criticizes the law and development movement for having

Joanne Scott eds., 2006). De Búrca uses this language to describe an experimentalist model of governance within legal scholarship that increasingly aims to recast governance as a set of collaborative problem-solving processes rather than a specific set of institutions, just as Stromseth, Wippman, and Brooks seek to recast law as local and evolving relations among public, civil society, and private actors rather than simply rules and institutions. Although for the most part scholars in law and development and scholars in the emergent field of new governance do not overlap, there is clear cross-fertilization of ideas. For example, Thomas McInerney, *supra* note 38, at 129-32, draws on new governance literature to propose that law and development practitioners should design hybrid public-private problem-solving processes that encourage direct citizen participation. See also Boaventura de Sousa Santos & César A. Rodríguez-Garavito, *Law, Politics, and the Subaltern in Counter-Hegemonic Globalization*, in *LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY* 1, 5-6 (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., 2005) ("The governance perspective echoes the U.S. legal realists' and social pragmatists' concern with social engineering that inspired the first generation of law and development scholars and practitioners in the 1960s.").

74. STROMSETH, WIPPMAN & BROOKS, *supra* note 3, at 339-40; see also Stromseth, *supra* note 67, at 421 ("By empowering people to know about their alternatives, not only does this give them more choices, but also it puts a certain amount of creative pressure on the traditional dispute settlement system because all of sudden the tribal chiefs know that they are in competition for market share in dispute resolution. Maybe they need to offer a higher quality of justice if they want a continued flow of business.").

75. Cao, *supra* note 3, at 358. Cao also explores links between culture and economic development in Lan Cao, *The Ethnic Question in Law and Development*, 102 MICH. L. REV. 1044 (2004) (reviewing AMY CHUA, *WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY* (2003)), and Lan Cao, Book Review, 101 AM. J. INT'L L. 901, 904 (2007) [hereinafter Cao, Book Review] (reviewing STROMSETH, WIPPMAN & BROOKS, *supra* note 3).

been “focused almost exclusively on the formal aspects of law, on codes and legislation and courts. It has neglected the less quantifiable, though crucial, task of changing habits, mindsets, traditional ideas, or what I call . . . culture.”⁷⁶ Consider the following passage:

I propose that law and development move beyond law and the technical dimensions of the “rule of law.” . . . I argue that we must enter the cultural milieu and ask whether certain cultural attributes in a given society are an impediment to that society’s economic development. Law may still be relevant, but only if it is also viewed culturally, and not just instrumentally, “as the embodiment of norms . . . and the repository of social meanings.” If law embodies or reflects norms, then norms must accordingly be addressed, especially those that may be at odds with development objectives.⁷⁷

Like Brooks, Cao advocates a shift from law to culture: from law as an acultural and instrumental technique to law as an intrinsic product of culture (“the repository of social meaning”) as well as from law as an instrumental technique to culture as an instrumental technique of its own. In weak states, Cao argues, law cannot itself promote social change:

Although law does have an expressive function and thus certain laws make certain statements which could in turn influence social norms, this capacity to affect preferences and beliefs through law is questionable in countries where the rule of law is itself weak. For those countries, law is insufficient and culture change will be needed.⁷⁸

76. Cao, *supra* note 3, at 369, 411. Cao defines culture as the “beliefs, preferences, and behaviors of [a community’s] members, along with the mechanisms that link these traits to one another” and “the way in which groups distinguish themselves from other groups” through “shared histories, traditions, values, and beliefs.” *Id.* at 371 (footnotes omitted). And, like Brooks, Cao begins with Carothers’ “Rule-of-Law Assistance Standard Menu.” *Id.* at 369. This “formalistic approach emphasizing rule of law and market development,” she argues, pays insufficient attention “to the non-law framework, norms, and culture that influence the efficacy of formal laws.” *Id.* at 370.

77. *Id.* at 358 (footnote omitted).

78. *Id.* at 360-61. Brooks makes similar points. For example, she writes: “In the U.S., for instance, where we basically share a substantive normative commitment to the rule of law, changes in formal law certainly affect our behavior, generally (although not always) in ways that are possible to predict.”

If law in weak states transcends the norms and values of the individual culture-bearers it is meant to regulate and reproduce, culture, by contrast, is particular, local, and locatable within the beliefs, attitudes, and practices of ordinary people and domestic social structures. Cao's examples of culture thus span:

specific practices: India's caste system and the preferences of many generations of high caste Indians for economic and social segregation; restrictions on education for girls in many poor countries; the prohibition on charging interest because it is an essential part of the "Islamic way of life"; personalistic and group-focused relationships as well as patterns of authority that discourage individual wealth accumulation, especially by those not from the traditional ruling elites. . . . [and] general inclinations, values, preferences or mindsets that do not contribute positively towards economic development. Examples include views about authority and dominance, status as an inherited rather than acquired attribute; the relationship between the collective and the individual; superstitions and the tendency to exalt the past.⁷⁹

Because culture—or, here, the values, mindsets, and behaviors of individuals—is "dynamic and heterogeneous"⁸⁰ not "stable or inert,"⁸¹ Cao argues culture change projects are both legitimate and plausible. "Cultures have always changed," she writes, "culture is not 'independent, unchanging and unchangeable'" and "is all the more 'nonhomogeneous, nonstatic, and interactive' in today's globalized world."⁸²

Ultimately, Cao appears most concerned with the ways in which individual self-perceptions can limit people's social and material readiness to participate in market activity. For example, she draws on literature that "demonstrates how an individual's understanding of his or her own self, which is in turn tied to his or her socially constructed being as a 'Hindu,' an 'untouchable,' determines access to

Brooks, *supra* note 3, at 2299. And "although social norms are tightly linked to law in some societies, they are not at all linked in others. When they are delinked, changing the law will have little effect; only an explicit focus on norm creation is likely to lead to the possibility of the rule of law." *Id.* at 2323.

79. Cao, *supra* note 3, at 358-59.

80. *Id.* at 398.

81. *Id.* at 397.

82. *Id.* at 394-95 (footnotes omitted).

education, trading group, and social network.”⁸³ An individual’s understanding of herself is also tied to other “internal constraints,” such as insufficient demand by girls for their own education.⁸⁴ As for elites, “one could ask,” Cao proposes, “if certain values and attitudes may be an obstacle to economic progress and whether [they] . . . subscribe to such values and attitudes.”⁸⁵

Like other neocultural interventionist scholars, Cao aims to identify and change self and social understandings that impede development. “[I]nterveners will draft the necessary laws, construct the necessary institutions. . . . Yet history and experience have shown that such measures are not sufficient. . . . New norms [will] have to be inculcated. . . . Yet how does one go about doing this?”⁸⁶ As a possible model for change, Cao proposes projects like the Grameen Bank which requires, as a condition of lending, that debtors recite specific promises (e.g., to use pit latrines, educate their children, spend appropriately on weddings).⁸⁷ Similar to the more general educational and empowerment projects proffered by Stromseth, Wippman, and Brooks, Cao’s prescriptions are about enabling people to comprehend their attitudes and values about law and development differently.

Thus if Riles divides the world of legal scholars into “culturalists” who “generally treat law as the embodiment of norms . . . and the repository of *social meanings*” and “instrumentalists” who “view law in primarily pragmatic instrumental terms, as a tool to be judged by its successes or failures in achieving stated ends,” then the scholars I describe here position themselves as a self-conscious amalgam of the two: cultural instrumentalists, so to

83. *Id.* at 387.

84. *Id.* at 388.

85. *Id.* at 390.

86. Cao, Book Review, *supra* note 75, at 904.

87. Cao, *supra* note 3, at 410-11. See generally The Sixteen Decisions of Grameen Bank, <http://www.grameen-info.org> (“16 Decisions” hyperlink located under “Quick Links”) (last visited Mar. 31, 2009). For sobering data on some of the effects (or lack thereof) of this social conditioning and its link to market participation, see Rashmi Dyal-Chand, *Reflection in a Distant Mirror: Why the West has Misperceived the Grameen Bank’s Vision of Microcredit*, 41 STAN. J. INT’L L. 217, 259 (2005).

speak.⁸⁸ And they reject the thesis that law transcends the society it governs: they instead borrow from the legal anthropologist the claims that law is a cultural phenomenon and that it can be analyzed by observing the ways in which ordinary people understand and experience legal ideas and institutions.⁸⁹ And they are transforming these claims into policy tools. These tools treat culture—or, more accurately, the individuals envisioned to embody it—as capable of and responsible for transforming law from an empty and autonomous set of forms into an overarching, meaningful, and relevant social field. In other words, if law depends on culture for meaning, then the policy of creating new law would seem to require the policy of creating new cultural meanings as well.

To be sure, none of these scholars propose that culture change is a silver bullet, easy to achieve, or alone sufficient to pursue the ends of law and development. But all agree that it is a promising, even necessary, component of a rule-of-law development plan. For Brooks, engaging in purposive culture change projects is a moral imperative insofar as these efforts stand to alleviate involuntary suffering.⁹⁰ Thus, her aim is to enable interveners to carry out these projects as “self-consciously and effectively as possible.”⁹¹ Stromseth, Wippman, and Brooks likewise write, “The task of creating rule of law cultures requires interveners to enter

88. Riles, *supra* note 15, at 973-74; cf. Annelise Riles, *Anthropology, Human Rights, and Legal Knowledge: Culture in the Iron Cage*, 108 AM. ANTHROPOLOGIST 52 (2006) (describing the ways in which legal knowledge instrumentalizes all of its encounters, including those with culture, in its wake).

89. For example, Susan Silbey explains that “cultural analyses of law attempt to describe the processes by which law contributes to the articulation of meanings and values in daily life.” Susan S. Silbey, *Making a Place for Cultural Analyses of Law*, 17 LAW & SOC. INQUIRY 39, 42 (1992). For an overview of multidisciplinary contributions to the cultural study of law, see generally Austin D. Sarat, *Redirecting Legal Scholarship in Law Schools*, 12 YALE J.L. & HUMAN. 129 (2000) (reviewing PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* (1999)). See also CULTURAL ANALYSIS, CULTURAL STUDIES, AND THE LAW (Austin Sarat & Jonathan Simon eds., 2003); PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* (1999); LAW IN THE DOMAINS OF CULTURE (Austin Sarat & Thomas R. Kearns eds., 1998); Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35 (2001).

90. Brooks, *supra* note 3, at 2321-22.

91. *Id.* at 2340.

into largely uncharted territory, but it is territory that can't be neglected."⁹² For Cao, "A culture change project should be considered if certain cultural attributes are 'harmful to economic productivity.'"⁹³

It is still too early to assess the actual effects of this renewed turn to culture. But its adoption in law review articles,⁹⁴ and actual development policy has been swift and broadspread. In 2004, one commentator noted that "[t]op-down, formulaic and sector-specific reforms have, in some international aid circles, been supplemented or even replaced with longer-term, grassroots initiatives that seek to promote the development of a 'rule of law culture.'"⁹⁵ A stunning example of how legal scholarship can diffuse into practice, a 2007 USAID-funded project report opens with the words of Stromseth, Wippman, and Brooks: "Promoting the Rule of Law involves . . . changing culture as much as it

92. STROMSETH, WIPPMAN & BROOKS, *supra* note 3, at 314.

93. Cao, *supra* note 3, at 384.

94. Erika R. George, *After Atrocity Examples from Africa: The Right to Education and the Role of Law in Restoration, Recovery, and Accountability*, 5 LOY. U. CHI. INT'L L. REV. 59, 77, 84-85 (2007) (arguing that "lawyers and policy makers involved in transitional justice initiatives should see themselves as tasked with the challenge of creating the conditions necessary for the growth of a rule of law culture," which "is a long-term project, especially in societies where a skepticism of law may need to be unlearned before a more constructive role for law in society can flourish"); John C. Reitz, *Export of the Rule of Law*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 429, 468, 472-73 (2003) (calling for "strategies to export values, not statutes" among legal elites and to create a "rule of law culture" among "the mass public," by stimulating "a bottom up demand for the rule of law"); David Tolbert with Andrew Solomon, *United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies*, 19 HARV. HUM. RTS. J. 29, 55 (2006) (arguing that "[i]n addition to rebuilding the institutions of modern justice systems, [rule-of-law assistance programs] can also be instrumental in fostering the values and attitudes that make up a 'rule of law culture' within a society, and in creating a demand for the rule of law at the political and grassroots levels"); Varda Hussain, Note, *Sustaining Judicial Rescues: The Role of Outreach and Capacity-Building Efforts in War Crimes Tribunals*, 45 VA. J. INT'L L. 547, 550 (2005) (arguing that the international community should link "the establishment of tribunals [with] building a rule of law culture"). In November 2008, the *Minnesota Journal of International Law* sponsored a symposium focused "on the broad theme of creating a global rule of law culture." See *Creating a Global Rule of Law Culture*, <http://www.law.umn.edu/mjil/2008-symposium.html> (last visited Feb. 1, 2009).

95. Elisabetta Baviera, *A Closer Look at the Rule of Law* (2004), <http://www.lawanddevelopment.org/articles/ruleoflawpaper.html> (last visited Mar. 31, 2009).

does creating new institutions . . . Without a widely shared cultural commitment to the idea of the Rule of Law, courts are just buildings, judges just public employees, and constitutions just pieces of paper.”⁹⁶ Another USAID-funded report calls building “a rule of law culture” a first order priority in post-transition Cuba.⁹⁷ The American Bar Association now lists “building a ‘rule of law culture’” through programs of popular education among its core areas of development assistance—in between “combating corruption” and “revising procedural and substantive criminal codes.”⁹⁸ A 2007 policy paper published by an Australian institute calls on the U.N. to create “rule of law cultures” through its peacekeeping efforts.⁹⁹ That same year, the RAND Corporation included a section on “Establishing a Rule-of-Law Culture” in *The Beginner’s Guide for Nation-Building*, to enable legal practitioners to move beyond a standard set of technical institutional reforms associated with building the rule of law.¹⁰⁰

96. ABA RULE OF LAW INITIATIVE & FREEDOM HOUSE, INC., RULE OF LAW IN TIMOR-LESTE 2 (2007) (emphasis omitted) (quoting JAMES DOBBINS, SETH G. JONES, KEITH CRANE & BETH COLE DEGRASSE, *THE BEGINNER’S GUIDE TO NATION-BUILDING* 88 (2007)). Dobbins, Jones, Crane, and DeGrasse appear to take this language from STROMSETH, WIPPMAN & BROOKS, *supra* note 3, at 75-76.

97. LAURA PATALLO SÁNCHEZ, ESTABLISHING THE RULE OF LAW IN CUBA 7 (2003), available at http://ctp.iccas.miami.edu/Research_Studies/LPatalloSanchezRuleofLaw.pdf.

98. ABA Rule of Law Initiative—Europe and Eurasia, http://www.abanet.org/rol/europe_and_eurasia (last visited Mar. 31, 2009); see also Am. Bar Ass’n, *ABA Rule of Law Programs Have Global Impact*, ARK. LAW., Oct. 2006 at 14, 16 (“The international programs of the ABA have developed a wide array of programming to assist in reforming the legal education systems in our host countries and to foster a more robust rule of law culture through legal literacy initiatives”).

99. Jeremy Farrall, *United Nations Peacekeeping and the Rule of Law* 8 (Austl. Nat’l Univ. Ctr. for Int’l Governance & Justice, Issues Paper No. 1 2007); see also Norman Henry Pentelovitch, *Seeing Justice Done: The Importance of Prioritizing Outreach Efforts at International Criminal Tribunals*, 39 GEO. J. INT’L L. 445, 484 (2008) (describing how efforts to create the Special Court of Sierra Leone included “numerous initiatives targeted at building a rule of law culture through outreach” to local communities).

100. DOBBINS ET AL., *supra* note 96, at 87-91. They write: “[F]or rule of law to exist, the law’s ‘consumers’—ordinary people—need to be convinced of the value of legal institutions and educated in what it can do.” *Id.* at 90. There is also “The Culture of Lawfulness Project,” a U.S.-based NGO that creates educational initiatives “to enhance societal involvement in supporting the rule of law” in various countries. See Welcome to the Culture of Lawfulness,

Thus, at what may become the inception of a new shift within law and development practice—from building the rule of law to building rule of law *cultures*—the time may be right to question the concept of culture being taken for granted. Translating the turn to culture into practice, and dealing with real people in actual cultural situations, may produce surprises that reveal the limits of neocultural interventionists' conceptualizations not only of culture but also of law.

II. MAKING SENSE OF CULTURE AS AN ANALYTIC TOOL OF LAW AND DEVELOPMENT

The remainder of this Article responds directly to the call of neocultural interventionist scholars to consider how culture change—that is, changing people as a means of promoting law and development—might actually work. To that end, I begin by examining how the concept of culture becomes configured when it is deployed as a means of entrenching law. Within its disciplinary home in anthropology, culture refers most generally to complex intersections of human agency and social structure.¹⁰¹ For example, anthropologists John Comaroff and Jean Comaroff describe culture as “the semantic ground on which human beings seek to construct and represent themselves and others—and, hence, society and history.”¹⁰² When scholars configure culture as a tool of representation in this way, then, as Don Mitchell cautions, they cannot “draw on culture itself as a source of explanation; rather culture is always something to be explained as it is socially produced through myriad struggles over and in spaces, scales, and

<http://www.cultureoflawfulness.org> (last visited Mar. 31, 2009).

101. For a pithy history of the concept of culture within anthropology that summarizes multiple and competing definitions, see KEVIN AVRUCH, *CULTURE & CONFLICT RESOLUTION* 5-16 (1998).

102. They write further:

As this suggests, [culture] is not merely a pot of messages, a repertoire of signs to be flashed across a neutral mental screen. It has form as well as content; is born in action as well as thought; is a product of human creativity as well as mimesis; and, above all, is empowered.

JEAN COMAROFF & JOHN COMAROFF, 1 OF REVELATION AND REVOLUTION: CHRISTIANITY, COLONIALISM AND CONSCIOUSNESS IN SOUTH AFRICA 21-22 (1991), *quoted in* RANKIN, *supra* note 41, at 47.

landscapes. . . . '[C]ulture' is always and everywhere inextricably related to social, political, and economic forces and practices."¹⁰³

Neocultural interventionists, however, aim to use culture to achieve particular policy ends and hence they cast culture in a far more specific form. They first configure culture as a mental domain, or rather as a bundle of conscious values and beliefs possessed by individuals. I call this *culture as consciousness*. Thus, for example, in neocultural interventionist paradigms, a development practitioner can intelligibly ask whether an individual "has" a suitable cultural relation to law. As we have seen, one has such a suitable relation when one believes in, values, or simply wants the kind of social existence that the rule of law envisions. I do not challenge this conceptualization of culture on its own terms. Rather, I seek to examine, through ethnographic exploration in the Part that follows, how it produces particular kinds of programmatic knowledge about development beneficiaries, and with what potential blind spots and limitations. My ethnographic examples examine how ordinary people, rather than lack legal consciousness, repeatedly invoke legal ideals precisely because they cannot depend on legal rules to work as they should. These professed beliefs in law, I argue, function as political claims.

Neocultural interventionists, however, also configure culture as a behavioral domain—and it is here that culture becomes analogous to law. Both law and culture are imagined as a set of social rules capable of inducing behavioral change in a normative and reasonably predictable direction. I call this *culture as lawlike rules*. But this conceptualization of culture is only implicit in the scholarship I have surveyed and, as such, it requires careful, if also suggestive, explication. I also set forth what I see as its conceptual limitations (as a basis of development interventions) prior to turning to my ethnographic examples.

Here is how culture comes to resemble law in the neocultural interventionist project. As a tool of social change, law promises explicit guidelines for how the world

103. DON MITCHELL, *CULTURAL GEOGRAPHY: A CRITICAL INTRODUCTION* xvi (2000) (emphasis omitted), *quoted in* RANKIN, *supra* note 41, at 32.

should be—guidelines that are paradoxically at once general, autonomous, and acontextual *and* capable of actually shaping social behavior in specific contexts in reasonably enduring and predictable ways.¹⁰⁴ The challenge of exporting law to developing and post-conflict states resides in social, economic, and political relations that stubbornly resist the explicit demands of a liberal legal framework—be they demands for the equal education of girls, nondiscrimination in access to markets, or neutral law enforcement. As a result, transplanted law in those places appears *only* general, autonomous, and acontextual: a set of empty forms disconnected from the social contexts and social behaviors that law is meant to constitute, regulate, and reproduce.

What neocultural interventionist scholars propose as a solution rests on the powerful idea that, in certain contexts, culture maps more closely onto human consciousness and behavior than does law, and that in those contexts, culture presents a more reliable guide than law for shaping what humans want and how they will choose to behave. This is why neocultural interventionists turn to culture to admonish rule-of-law practitioners for exporting an autonomous set of “formal” legal rules. This is also why they invoke culture in a prescriptive or instrumental form: to embed those rules in context, and make them powerful and imbued with meaning.

But as neocultural interventionists deploy culture as a means of entrenching law, they describe law and culture as distinct, even oppositional, categories. Recall that in neocultural interventionist paradigms, transplanted legal rules and institutions stand outside of culture.¹⁰⁵ Culture by contrast is particular, locatable, and performed within

104. Numerous law and development scholars have noted the paradox of this promise. See, e.g., Cao, *supra* note 9, at 552 (“Modern law is to be both autonomous from social interests and instrumental for the purposes of establishing certain social interests”); Trubek, *supra* note 10, at 5 (proposing that modern law is conceptualized as “relatively autonomous from other sources of normative order” and as “an instrument through which a variety of possible social goals may be achieved”).

105. See, e.g., STROMSETH, WIPPMAN & BROOKS, *supra* note 3, at 76 (“Without a widely shared cultural commitment to the idea of the rule of law, courts are just buildings, judges are just bureaucrats, and constitutions are just pieces of paper.”) (emphasis omitted).

and against legal institutions that are formal and acultural.¹⁰⁶ Thus, although neocultural interventionists aim to denaturalize law—that is, to understand law as cultural and, therefore, as a particular social phenomenon that must operate within the cultural logic of a society—these acts of construction renaturalize law and legal institutions as the formal and acultural outside of a cultural inside.¹⁰⁷

And strikingly, in their work, as law becomes acultural in this way, culture begins to look like law. For them, culture becomes a set of general social rules capable of producing social behaviors in specific contexts in a reasonably determinate fashion. Thus, in neocultural interventionist accounts of culture, we can find positivist conceptualizations of culture that explain how the world is: Albanians who seek honor,¹⁰⁸ people who oppose the education of girls.¹⁰⁹ Here, culture is concrete, legible, and capable of offering highly predictive insight into social behavior. And we can also find normative and dynamic conceptualizations of culture. Here, culture is fluid and open to iteration and change.¹¹⁰ And, *once changed*, culture can ideally provide an alternate set of explicit and reasonably stable rules for how the world should be in those contexts where law alone is incapable of wielding similar regulatory force.

Law's failure to produce its intended effects in weak states thus becomes a problem of competing normative orders: one order being law's rules, which are formal, acultural and *indeterminate* (or incapable of producing

106. See Gershon & Taylor, *supra* note 5. See, e.g., *supra* note 79 and accompanying text.

107. See Gershon & Taylor, *supra* note 5. The very project of deploying "culture" to strengthen "law" appears practically to compel this sort of description. Brooks, for example, explicitly distinguishes law in its "formal sense" from law as "a set of normative commitments," in order to avoid the "risk [of] assuming what we need to prove." Brooks, *supra* note 3, at 2306 n.99. Cao similarly explicitly distinguishes "culture" from "an acultural framework [of] law and development." Cao, *supra* note 3, at 370.

108. Brooks, *supra* note 3, at 2291-92, 2334-35.

109. Cao, *supra* note 3, at 388-89.

110. See *supra* notes 80, 81, 82, and surrounding text; see also Brooks, *supra* note 3, at 2321 ("[H]uman beings can and do consciously change the cultures in which they live . . .").

their intended effects), and the other order being culture's rules, which are relevant, powerful, and determinate. But prescriptive efforts to deploy a conceptualization of culture analogous to the conceptualization of law that law and development has always desired but thus far has been unable to achieve—a powerful set of social rules capable of producing social relations and social order in a reasonably predictable and determinate fashion¹¹¹—are likely to replicate, rather than correct, the disappointing results of projects of law reform. This is because representations of culture as lawlike rules, like representations of the rules of law themselves, are incapable of sustaining a singularly determinate or, for that matter, a consistently indeterminate form.

Legal and cultural theorist Peter Fitzpatrick explains that many definitional debates about culture split along the following lines: culture is claimed to be determinate, reified, and stable *or* foundationally indeterminate, dynamic, and riddled with fissures and internal dissent.¹¹² Fitzpatrick, however, reasons that “[d]espite the seeming opposition between these [two dimensions], culture has to be in a sense both.”¹¹³ He is moved to this conclusion by the myriad ways in which people interact with their own and other “cultures,” producing both consistency and change.¹¹⁴ He argues that “[c]ulture cannot exist as either of its two dimensions. It cannot endure as determinate invariance, as stasis, yet if it were merely responsive, it would dissipate entirely.”¹¹⁵ Fitzpatrick therefore proposes that we think of culture as a conceptual relation between two opposite states of being: a “positioned” and “determinately enduring existence,” on the one hand, and an “attentiveness and attunement to what is ever beyond its determinate existence,” on the other hand.¹¹⁶ If culture simply

111. See, e.g., Rittich, *supra* note 32, at 939 (“In the discourse of development, law is presented over and over again as determinate and stable . . .”).

112. See Fitzpatrick, *supra* note 46, at 4.

113. Peter Fitzpatrick, *Costs of Culture 1* (unpublished paper prepared for the Law and Society Annual Meeting, Humboldt University, Berlin (July 28, 2007)) (on file with author).

114. *Id.* at 1-2.

115. *Id.* at 2.

116. *Id.* Bourdieu offers us a similar conceptualization of culture by way of

represented fixity, it could never be transformed in response to new people, new ideas, or changing material structures; if culture simply represented responsiveness or flux, then it would cease to exist at all.

Fitzpatrick self-consciously represents culture precisely the way our neocultural interventionists do, only they are more covert and strategic: for them, culture is sometimes determinate and sometimes indeterminate and responsive. Neocultural interventionists invoke culture as a means to explain actors' behavior in relation to law (for example, why some people follow law when others do not). When they do so, they represent culture as a set of social rules that are entrenched and stable. But they also propose to act upon local culture to change it, and justify this program by invoking the idea that culture is dynamic and iterative and therefore subject to the forces of development and change. Culture thus emerges as a set of social rules that are both determinative and stable *and* responsive and flexible. But whereas Fitzpatrick places culture's determinate and responsive dimensions into a mutually constituting relation, neocultural interventionists aim specifically to *contain* the determinate dimension of people's "culture" that are thought to be in conflict with development and the rule of law. And they aim to do so in ways that leave development beneficiaries—in Fitzpatrick's terms—"utterly

the term *habitus*. As sociologist John Thompson explains:

The *habitus* is a set of *dispositions* which incline agents to act and react in certain ways. . . . The dispositions . . . produced thereby are also *structured* in the sense that they unavoidably reflect the social conditions within which they were acquired. . . . [And] also *durable*: they are ingrained in the body . . . operating in a way that is pre-conscious and hence not readily amenable to conscious reflection and modification. Finally, the dispositions are *generative* and *transposable* in the sense that they are capable of generating a multiplicity of practices and perceptions in fields other than those in which they were originally acquired. . . .

....

Hence particular practices or perceptions should be seen, not as the product of the *habitus* as such, but as the product of the *relation between* the *habitus*, on the one hand, and the specific social contexts or 'fields' [or sites of struggles] within which individuals act, on the other.

John B. Thompson, *Editor's Introduction to PIERRE BOURDIEU, LANGUAGE AND SYMBOLIC POWER* 1, 12-14 (John B. Thompson ed., Gino Raymond & Matthew Adamson trans., 1991).

responsive, or more accurately, utterly receptive" to alternative yet newly determinate cultural forms.¹¹⁷

Consider, for example, how Cao identifies the values and behaviors that stand in the way of development: "[T]he preferences of many generations of high caste Indians for economic and social segregation; . . . personalistic and group-focused relationships as well as patterns of authority that discourage individual wealth accumulation, . . . status as an inherited rather than acquired attribute; . . . superstitions and the tendency to exalt the past."¹¹⁸ Having conceptualized culture as an explicit and reasonably determinate set of social rules in this way, Cao also argues that culture is not fixed and static but rather marked by fissures and heterodox orientations and hence is capable of transforming itself in responses to stimuli from below and above. Containing culture's fixed and determinate dimension in favor of its flexible and responsive one is now precisely what is needed to make a persuasive case for change. Thus Cao represents culture-bearers as receptive to new explicit cultural norms *and* able to internalize these norms—be they diffused through pedagogy, media, or material incentives—as their new implicit, taken-for-granted, and more or less determinate normative reality.

As a matter of empirical speculation, Fitzpatrick doubts whether interveners can achieve this strategic and stepwise task.¹¹⁹ Here, however, I want to make a more modest claim. As a point of intervention to change social behavior, culture, no less than law, represents social norms and practices of power that signify a present determinate meaning *and* a present responsiveness to what lies beyond that meaning at any given point in time.¹²⁰ But if we have moved from changing law to changing law *and* culture because the former alone is intractable to reform, then we should probably ask whether a focus on culture can promote the ends of law and development in ways that are

117. Fitzpatrick, *supra* note 113, at 3.

118. Cao, *supra* note 3, at 358-59.

119. Fitzpatrick, *supra* note 113 at 2-3; Fitzpatrick, *supra* note 46, at 10-11.

120. See Fitzpatrick, *supra* note 113. For Fitzpatrick, the "intrinsic responsiveness of culture, its attentiveness and attunement to what is ever beyond its determinate existence, makes impossible the reduction of culture to what invariably 'is.'" *Id.*

intrinsically more capable than law of achieving their planners' particular policy ends. It is true that the "rule of law is not something that exists 'beyond culture,'" as neocultural interventionist scholars argue.¹²¹ But deploying lawlike conceptions of culture as a means of addressing the indeterminacies and ineffectiveness of failed rule-of-law projects immediately generates a new set of problems—partly by reviving the old ones in a new form. The neocultural interventionist project has yet to grapple directly with the indeterminacies, conflicts, and social struggles embedded in culture, configured, paradoxically, as a corrective for "formal" understandings of law.

In the Part that follows, I propose that ethnographic accounts of local development challenges can enable us to study and assess the value and limitations of the contemporary turn to culture. To that end, and in the spirit of neocultural interventionist calls to develop comparative case studies,¹²² I draw on two suggestive ethnographic examples from Nepal. In my examples, neocultural interventionist projects encounter the limitations of both their conceptualizations of culture, first as consciousness and second as lawlike rules. The first example reveals internal tensions in efforts to explain the absence or presence of the rule of law by invoking the conscious values and beliefs of ordinary citizens. The second example reveals similar tensions in efforts to change individual consciousness as a means of changing social behavior in a reasonably determinate fashion. In my examples, we see individuals who articulate shared desires for social justice and social order, but who nonetheless enact these desires in ways that are in tension with the rule of law as understood in most development accounts. Hence, they suggest the simultaneous determinacy and responsiveness of constructs like values and beliefs as they shape social practice. And most powerfully, they index a profound ambiguity at the heart of what it means to be a person who is for or against development and the rule of law.

121. Brooks, *supra* note 3, at 2285.

122. See, e.g., *id.* at 2331.

III. "STRENGTHENED RULE OF LAW AND RESPECT FOR HUMAN RIGHTS IN NEPAL"¹²³

A. Introduction

With a per capita income of approximately \$470 per year¹²⁴ and a geopolitically significant position between the borders of India and China, Nepal has, for decades, received donor aid in amounts potentially "disproportionate to its capacity to absorb and disperse it."¹²⁵ As Katharine Rankin and Yogendra Shakya argue, aid assistance there "quickly became a terrain of ideological conflict—expressing particularly acute tensions between socialist and capitalist models of development and, more recently, the ideological shift from state-led to market-led planning."¹²⁶ Yet since the advent of democracy in 1990, all of Nepal's elected governments have professed ideological commitments to core tenants of both liberal democracy and neoliberal economic policy.¹²⁷ In fact, during its nine months in power ending in 1995, even the Communist Party of Nepal (United Marxist-Leninist) "proposed to institute a Value Added Tax, privatize public enterprises, liberalize trade to encourage foreign investment and promote exports, reform the finance sector, and cut subsidies."¹²⁸ And aid to Nepal has increasingly involved efforts to promote good governance and the rule of law in addition to (and likely as an outgrowth of) neoliberal economic policies. Add to this mix persistent poverty, a very spotty record on human rights and economic reform notwithstanding large amounts of development assistance, a decade-long civil war, and

123. I borrow this title from a USAID grant. See *infra* note 129.

124. Bureau of S. & Cent. Asian Affairs, U.S. Dep't of State, Background Note: Nepal (Jan. 2009), <http://www.state.gov/r/pa/ei/bgn/5283.htm>.

125. Katharine N. Rankin & Yogendra B. Shakya, *Neoliberalizing the Grassroots? Microfinance and the Politics of Development in Nepal*, in NEO-LIBERALIZATION: STATES, NETWORKS, PEOPLES 48, 51 (Kim England & Kevin Ward eds., 2007).

126. *Id.* at 51-52.

127. Genevieve Lakier, *Illiberal Democracy and the Problem of Law: Street Protest and Democratization in Multiparty Nepal*, in CONTENTIOUS POLITICS AND DEMOCRATIZATION IN NEPAL 251, 256 (Mahendra Lawoti ed., 2007).

128. RANKIN, *supra* note 41, at 45.

sharp social cleavages along gender, caste, and ethnic lines, and Nepal appears as good a case study as any to explore some of the possibilities and limitations of a new law and development technology.

What is more, an unmistakably cultural approach to promoting law and development has already made its way into mainstream development discourse there. In 2004, USAID awarded a three-year contract to a US-based development organization titled "Strengthened Rule of Law and Respect for Human Rights."¹²⁹ The direction of the grant likely reflected the goals set forth by USAID/Nepal for the fiscal years 2003 to 2007 in a 2002 draft report. In a section entitled "The Development Challenge," the 2002 draft report explains that "Nepalese government managers generally lack the vision and technical skills to effectively manage the reform process," and therefore will require significant donor support.¹³⁰ A primary aim of assistance is therefore to promote "better governance and greater protection of human rights, [so that] the Nepalese people will accord more respect to democratic institutions, place greater value on their democratic freedoms, more readily defend encroachment upon their democratic rights, and hold public officials and the institutions they serve more accountable for their actions."¹³¹ Note the report's diagnosis of those who govern as lacking vision (in addition to technical skill) to manage democratic reform, and its diagnosis of those who stand governed as lacking a democratic consciousness sufficiently robust to compel the state to live up to its demands. The report thus envisions

129. See, e.g., ARD, INC., STRENGTHENED RULE OF LAW AND RESPECT FOR HUMAN RIGHTS IN NEPAL: ANNUAL REPORT, 1 OCTOBER 2004 THROUGH 30 SEPTEMBER 2005 (Oct. 31, 2005), http://pdf.usaid.gov/pdf_docs/PDACJ884.pdf. I should disclose that I helped prepare a part of the U.S.-based development organization's response to USAID's request for proposals.

130. USAID/Nepal, "DG Next Steps" Concept Paper, 2003-2007 at 7 (Draft Version of Nov. 19, 2002) (on file with author). In an effort to confirm the status of this draft report, I spoke with Julie Werbel, Democracy Specialist at USAID. She was only able to inform me that in the intervening years, USAID/Nepal recommended several changes to its long-term democracy and governance strategy and that, therefore, the goals set forth in the 2002 draft report may or may not be part of USAID/Nepal's newer approach. Telephone Interview with Julie Werbel, Democracy Specialist, USAID, in Washington, D.C. (Apr. 20, 2006).

131. *Id.* at 8.

Nepali people, both within the state and in the general population, whose vision and consciousness are enabled and constrained by normative forces other than the rule of law.

In line with an emphasis on enabling ordinary people to respect, value, and defend democracy and human rights, one of the first projects administered pursuant to the new USAID grant was a poll of a large cross-section of ordinary citizens about how they in fact understood their human and legal rights.¹³² The poll, published in 2006, reports that “approximately forty-six percent of the 3,045 sample respondents were found to be familiar with fundamental rights endorsed by the Nepalese Constitution. . . . [But] a large majority (ninety-four) of respondents [and eighty-five percent of illiterate respondents] believe that violations of human rights were taking place in the country.”¹³³ That human rights violations were taking place in Nepal is an assertion hardly in need of support. The events of the recent past included both a Maoist insurgency and, in 2005, a military coup during which the King declared emergency rule, suspending many fundamental rights in an effort to crush the insurgency.¹³⁴ Over 13,000 people, many of them civilians, have been killed by the conflict¹³⁵ and both the Maoists and the government have been accused of serious human rights violations.¹³⁶ During the period of emergency rule, Nepal’s independent press functioned under severe censorship; political activists, political party leaders, and student leaders were routinely arrested without adequate warrant; and human rights activists fled the country or went into hiding. And Nepal had, by many accounts, one of the highest rates of disappeared persons in the world.¹³⁷

132. ARD, INC., RULE OF LAW AND HUMAN RIGHTS: OPINION POLL (2006), http://pdf.usaid.gov/pdf_docs/PNADJ623.pdf.

133. *Id.* at 17.

134. For background on the insurgency, see Arjun Karki & David Seddon, *The People’s War in Historical Context*, in *THE PEOPLE’S WAR IN NEPAL 3* (Arjun Karki & David Seddon eds., 2003).

135. *Nepalese Monarchy to be Abolished*, BBC NEWS, Dec. 24, 2007, http://news.bbc.co.uk/2/hi/south_asia/7158670.stm.

136. For a detailed report of human rights abuses by state agents and Maoists insurgents, see AMNESTY INT’L, NEPAL: A SPIRALLING HUMAN RIGHTS CRISIS (2002), <http://www.amnesty.org/en/library/asset/ASA31/016/2002/en/dom-ASA310162002en.pdf>.

137. See, e.g., HUMAN RIGHTS WATCH, WORLD REPORT 2005, at 304 (2005),

What I was unable to find, however, was evidence of how the social fact captured in the opinion poll just cited—people certain that rights are being violated even as they are unable or unwilling to articulate precisely what those rights are—shaped USAID's approach to strengthening the rule of law and respect for human rights. I have read all the documents I could obtain produced in the expenditure of this grant—work plans, trip reports, annual reports, etc.—and they display some puzzling lacunae.¹³⁸ They contain no evidence of programmatic efforts to recruit existing Nepali consciousness of human rights violations, despite the opinion poll that shows it is very salient.¹³⁹ Nor was there any visible connection between USAID's overarching goals—to induce Nepali people to place greater value on their democratic freedoms, to hold their government accountable, and to defend against encroachment upon their rights—and the existing array of social movements mobilizing against these very deficits in Nepali political and social life.

In Nepal, struggles for various democratic development ideals, such as de-centralized land markets, women's property rights, and the eradication of domestic violence and indentured servitude, are waged on multiple, disparate, and often competing terrains. For example, during the People's War, Maoists campaigned aggressively for land

available at <http://hrw.org/wr2k5/wr2005.pdf>; Charles Haviland, *UN Torture Expert in Nepal Visit*, BBC NEWS, Sept. 10, 2005, http://news.bbc.co.uk/2/hi/south_asia/4232058.stm.

138. See U.S. Agency Int'l Dev., Development Experience Clearinghouse, <http://dec.usaid.gov/> (Select "PDF Full Text Search," then "Rule of Law/Human Rights," and "Nepal").

139. For example, the project's final report only references a lack of popular knowledge about law. It recounts that people have insufficient information about legal aid and about their right to receive government services without the payment of bribes. ARD, INC., NEPAL: STRENGTHENED RULE OF LAW AND RESPECT FOR HUMAN RIGHTS: FINAL REPORT 6, 24 (Aug. 10, 2007), http://pdf.usaid.gov/pdf_docs/PDACK092.pdf. Other reports list citizen knowledge of basic legal rights as an indicator of an objective to increase access to justice and list awareness of human rights violations (such as trafficking and torture) as an indicator of an objective to reduce these crimes. However, I could not find specific discussion of how these indicators were used in practice to design or measure programmatic interventions. See, e.g., ARD, INC., STRENGTHENED RULE OF LAW AND RESPECT FOR HUMAN RIGHTS IN NEPAL: THIRD ANNUAL WORK PLAN, 1 OCTOBER 2006 TO 10 JUNE 2007 4 (Oct. 31 2006), http://pdf.usaid.gov/pdf_docs/PDACJ906.pdf.

reform, capturing land in poor western regions of the country.¹⁴⁰ They proposed to “usher in capitalist relations of production” by redistributing the property of landowners “who do not put their labour or capital to use on the land” and by capping the rent and ownership rights of landowners who lease their land to tenant farmers.¹⁴¹ Calls for “serious structural improvements in land tenure” as a precondition for a stable democracy and a modern agricultural economy are supported not only by the Maoists, but by a range of political actors in Nepal.¹⁴² But as far as I can discover, land reform does not appear to be a significant mainstream donor priority.¹⁴³ In contrast to land reform, however, there have been significant donor-funded efforts to improve women’s property rights to parallel those of men, yet this is also a domain of ideological struggle. According to one group of scholars, “[a]lthough property rights for women are central to the Maoist revolutionary agenda, mainstream women’s groups lobbying for property rights for women have not considered it desirable to enter into a dialogue with the All Nepal Women’s Association (Revolutionary) (ANWAR) which is politically affiliated to

140. Mukunda Kattel, *Introduction to ‘The People’s War’ and its Implications*, in *THE PEOPLE’S WAR IN NEPAL*, *supra* note 134, at 49, 53.

141. Babu Ram Bhattarai, *The Political Economy of the People’s War*, in *THE PEOPLE’S WAR IN NEPAL*, *supra* note 134, at 117, 158.

142. Mohan Mainali, *‘Development’ vs the Maobaadis*, in *UNDERSTANDING THE MAOIST MOVEMENT OF NEPAL* 125, 126 (Deepak Thapa ed., 2003) (citation omitted). See, e.g., Prashant Jha, *Land and Peace*, *NEPALI TIMES*, Aug. 22, 2008. Jha writes:

[A]part from occasional civil society seminars and sporadic op-ed pieces, the land question isn’t on the agenda. It is a complex policy challenge, affects a majority of the country’s population, and has antagonistic classes pitted against each other. Do we need land reform? The consensus across the board is yes.

Id. Some Nepali commentators have advocated for the redistribution of land, “not because the peasants who till the land should own [it],” but rather to encourage peasants to adopt “better financial and marketing strategy for improving nationwide productivity.” Prakash Bom, Common Minimum Program of Maoist Nepal for a Consensus Government (Aug. 5, 2008), <http://www.nepalitimes.com.np/issue/2008/08/22/PlainSpeaking/15154>.

143. The Community Self Reliance Center, a “movement based” NGO, has for fifteen years supported land rights for tenant and landless farmers. It receives support from the following organizations: Action Aid, MS Nepal, DANIDA, Oxfam, and International Land Coalition. See generally Community Self Reliance Centre, <http://www.csrcnepal.org> (last visited Jan. 11, 2009).

the Maoist movement.”¹⁴⁴ Similarly, although development agencies have supported women’s efforts against the sale and distribution of alcohol, these efforts are distinct from the more coercive Maoist women’s campaigns against “liquor capitalists”¹⁴⁵ that have commanded far greater visibility and effect.¹⁴⁶ As one Nepali scholar writes: “It is a sad commentary on Nepal’s democracy that the liquor lobby and dubious human rightists are calling for ‘talks’ on the alcohol issue only when confronted with the fire and brimstone of the Maoist women.”¹⁴⁷ Here is an anecdotal description of how these Maoist campaigns unfold:

In Surkhet district the people tell of a Maoist people’s court. An all-women guerilla unit with the area commander came to a village at 10 p.m. to hold court. On trial was a husband who was habitually drunk and mercilessly beat his wife. He was warned. Everyone was told to bring out their bottles of raksi [rice wine], locally made and purchased. The bottles bought were to be returned to the shop. The Maoists would warn the shopkeeper. The home-brewed alcohol was destroyed after keeping some aside for medicinal and ritualistic purposes. A homily was delivered on the ill effects of alcohol, and the linkage between alcohol, immiseration, wife beating and illiteracy explained. After holding an adult literacy class, they left.¹⁴⁸

Yet, even among Maoists themselves there is internal dissent about the purposes and effects of these campaigns. Sujita Shakya, a women’s right activist and Maoist collaborator, writes: “The injustice, tyranny, exploitation and oppression faced by women cannot be overcome just by beating someone with 50-100 bamboo sticks and breaking pots of local wine.”¹⁴⁹

144. Shobha Gautam et al., *Where There are No Men: Women in the Maoist Insurgency in Nepal*, in UNDERSTANDING THE MAOIST MOVEMENT OF NEPAL, *supra* note 142, at 93, 105.

145. Saubhagya Shah, *The Other Side of the Alcohol Economy*, in UNDERSTANDING THE MAOIST MOVEMENT OF NEPAL, *supra* note 142, at 133, 134.

146. See, e.g., Tatsuro Fujikura, *The Role of Collective Imagination in the Maoist Conflict in Nepal*, 23 J. FOR ASS’N NEPAL & HIMALAYAN STUD. 21, 25-26 (2003).

147. Shah, *supra* note 145, at 134.

148. Gautam et al., *supra* note 144, at 107.

149. Sujita Shakya, *The Maoist Movement in Nepal: An Analysis from the Women’s Perspective*, in THE PEOPLE’S WAR IN NEPAL, *supra* note 134, at 375,

Or consider the struggle of *kamaiyas* (bonded laborers), which was organized around the pursuit of legal rights,¹⁵⁰ and which, in distinction to Maoist violence, has been described as precisely the kind of non-violent social movement that development agencies in Nepal can and should (and several, in various ways, did) support.¹⁵¹ In July 2000, after levying a series of village and district-level administrative claims to demand the enforcement of the minimum wage law, debt cancellation, and government remuneration, a group of *kamaiyas* staged a sit-in in the middle of the road near the parliament building in Kathmandu.¹⁵² The sit-in, which led to numerous government arrests and detentions, combined with the highly visible local uprisings, resulted in a government declaration of freedom and promises of rehabilitation in the form of money and land (promises that today are far from uniformly implemented).¹⁵³ One of the oldest and most high-profile human rights NGO in Nepal, however, contested this strategy of civil disobedience on behalf, it appears, of the rule of law. According to anthropologist Tatsuro Fujikura, this NGO felt that “comprehensive legislation for *kamaiya* liberation and rehabilitation, the

387.

150. See Tatsuro Fujikura, *The Bonded Agricultural Labourers' Freedom Movement in Western Nepal*, in 2 SOCIAL DYNAMICS IN NORTHERN SOUTH ASIA: POLITICAL AND SOCIAL TRANSFORMATION IN NORTH INDIA AND NEPAL 319, 322-26, 354 (Hiroshi Ishii et al. eds., 2007) (describing how the *kamaiyas'* use of liberal discourses of freedom and human rights prompted some scholars to claim that these discourses were “intimately tied with neo-liberal ideology, and hence [were] not genuinely liberatory”).

151. The *kamaiya* movement was organized and mobilized by an NGO named BASE (Backward Society Education) that owes its strength in part to the “legitimacy and resources, including its massive membership and transnational network of support, that it had built up through its ten years of work in the field of conventional, mainstream development.” Tatsuro Fujikura, *Discourses of Awareness: Notes for a Criticism of Development in Nepal*, 6 STUD. NEPALI HIST. & SOC'Y 271, 305-06 (2001) [hereinafter *Discourses of Awareness*]; see also Tatsuro Fujikura, *Emancipation of Kamaiyas: Development, Social Movement, and Youth Activism in Post-Jana Andolan Nepal*, 21 HIMALAYAN RES. BULL. 29, 31-33 (2001).

152. Fujikura, *supra* note 150, at 342-47.

153. See *id.* at 346-48. Fujikura reports that donors have provided assistance to *kamaiyas* who were granted official land titles, but that “many BASE leaders . . . have criticized the lack of international organizations that are willing to work directly on the issue of land rights.” *Id.* at 352.

kind that they had already drafted, needed to be passed by the parliament before the liberation process could begin.”¹⁵⁴

At minimum, what these small examples suggest is that there remain complex gaps between development efforts to strengthen respect for law and the range of groups passionately invoking law's demands, albeit in contentious and contradictory ways. Strategies range from liberal law reform projects to activist civil disobedience to radical (and certainly not always democratic) street protests to a revolutionary insurgency, all aimed at achieving a range of individual and group rights with new distributive entitlements. And law figures as a crucial element: Maoists propose to restructure landlord-tenant relations; Maoist women hold court; the *kamaiyas* cast their class struggle in juridical terms while their NGO advocates clash over the sequencing of public protests and legislative reform. Query whether the lack of rule of law in Nepal is connected to a lack of belief in law or a lack of normative commitments to various liberal values underlying the rule of law. Rather than the absence of legal consciousness, we have vexing social paradoxes: wild political energy and collective social struggles are channeled through legal language and legal forms, and emancipatory desires for law coexist with intense illegality.

Can we make sense of how—in places marked by violence and law's routine lack of application—law becomes an object of desire and passion? Colombian legal scholar Julieta Lemaitre invokes the phrase “legal fetishism” to describe a devotion to law that exceeds a rational or utilitarian calculation of law's benefits in the lives of ordinary Colombian citizens. She describes activists and citizens who desire law as a means of imagining alternative realities—ones that affirm the equality and inviolability of ordinary individuals even as, or perhaps precisely because, that promise is so frequently revealed as false by the violence and inequalities in their lives.¹⁵⁵ Brooks argues

154. *Id.* at 344.

155. Julieta Lemaitre, *Legal Fetishism at Home and Abroad*, 3 UNBOUND 6, 12-18 (2007); see also Patrick McAuslan, *In the Beginning Was the Law . . . an Intellectual Odyssey* 77 (unpublished paper presented at Cornell Law School East Asian Law and Culture Conference Series, Mar. 16, 2004), available at <http://lsr.nellco.org/cornell/ealccs/pld/2/> (arguing that “there is no part of the world where the principles of legal liberalism are not [already] relevant, if only

that in societies organized around the rule of law, law gives moral meaning to violence and to social organization.¹⁵⁶ But what these examples suggest is that we have yet to fully grapple with how law's signifying power—or its participation in definitional and hence political struggles—is salient not only in places where the rule of law works well (in a utilitarian/functional sense), but also, paradoxically, in places where it doesn't.

Theorizing what it would mean to administer development projects to increase respect for and awareness of rights among groups of people—who already hold beliefs and values about law and legal rights and, as the USAID poll suggests, who are already certain that their rights are being violated—may be a vastly more contentious and politicized project than development practitioners imagine when they propose culture change and legal empowerment. Many ordinary people already profess many of the kinds of values and desires that rule-of-law practitioners wish to instill—desires for egalitarian land markets, sobriety, non-violence, literacy, and minimum labor standards, but they do so in a political nexus completely at odds with anything known to rule-of-law imagery.

By way of more detailed exploration, I offer two ethnographic accounts of people acting in seemingly non-law abiding ways, but because of their commitments to what we could consider values underlying the rule of law.¹⁵⁷ The first account draws on the work of anthropologist Genevieve Lakier and involves citizens demanding social order through coercive forms of street protest—specifically, that the state regulate and administer compensation for injuries resulting from everyday traffic accidents. The second account draws on the work of anthropologist Lauren Leve and involves a group of village women who have lent their support to armed struggle in order to achieve, as they say, values such as social justice.

B. Accidents, Protests, and Roads

In Nepal, many functions of a modern bureaucratic

as an emancipatory project”).

156. See Brooks, *supra* note 3, at 2312-14.

157. See *id.* at 2322.

state are negotiated through means other than legal procedure. Allocating the costs of everyday traffic accidents, for instance, is not up to routine police supervision of traffic, well-functioning auto insurance, and lawsuits in tort but instead to endemic, popular road blockades or *chakka jams*. An iconic symbol of development, roads were scarce before Nepal's first democratic revolution in 1951.¹⁵⁸ By the 1970s, however, the government (by then reestablished as an absolute monarchy) devoted significant development expenditures, heavily subsidized by foreign aid, to transportation.¹⁵⁹ The goal, it claimed, was to promote national integration and economic development.¹⁶⁰ But in addition to promoting the nation and development, the project of building roads generated many other effects: weakening of local industries due to an influx of Indian commodities,¹⁶¹ increasing fatalities due to traffic accidents,¹⁶² fierce battles over who holds the "right" to operate transportation vehicles for profit, and the systemic utilization of roads as an instrument of collective protest.¹⁶³

Consider the following examples, which illustrate how extralegal and collective negotiations govern life on the roads in democratic Nepal, and which may appear to suggest a widespread lack of belief in the rule of law. Nepal's transportation sector is dominated by a "syndicate"

158. ARAN SCHLOSS, *THE POLITICS OF DEVELOPMENT: TRANSPORTATION POLICY IN NEPAL* 13 (1983). In 1951, Nepal had 376 kilometers of roads (of which 290 kilometers were fair-weather). By 1976, that number had increased to 3,200 kilometers.

159. *Id.*

160. National Planning Commission, *The Fourth Five-Year Plan* (1970-1975), ch. 10 at 1-2 (1970) (on file with author).

161. See JAGANNATH ADHIKARI & DAVID SEDDON, *POKHARA: BIOGRAPHY OF A TOWN* 86 (2002) (describing how the construction of a road linking the town of Pokhara to the Indian border weakened industries such as weaving and metalwork).

162. See, e.g., D.A.C. Maunder & T. Pearce, *Bus Accidents in the Kingdom of Nepal: Attitudes and Causes*, 22 INDIAN J. TRANSP. MGMT. 127 (1998); Nilambar Jha & Chandra Shekhar Agrawal, *Epidemiological Study of Road Traffic Accident Cases: A Study from Eastern Nepal*, 8 REG'L HEALTH FORUM 15 (2004); Poudel-Tandukar et al., *Traffic Fatalities in Nepal*, 291 J. AM. MED. ASS'N 2542 (2004) (research letter).

163. Genevieve Lakier, *The Spectacle of Politics: Protest, Violence, and the Problem of Democracy in Nepal, 1990-2006*, at ch. 2, *The Highway and the Chakka Jam* (2009) (unpublished dissertation manuscript, on file with author).

of bus companies, the Federation of Nepali Transport Entrepreneurs (FNTE), which holds monopoly control over most long-haul routes throughout the country.¹⁶⁴ In 2003, in response to a confrontation sparked by private competition, the FNTE shut down nearly Nepal's entire highway system—a *chakka jam* its members enforced for eleven consecutive days.¹⁶⁵ In negotiations with the national Ministry of Labor and Transport, the FNTE demanded that the government deny private transport companies outside its syndicate access to long-haul routes¹⁶⁶—a request that contravened both government policy and actual law in favor of market competition.¹⁶⁷ Although the government refused to change its laws as the FNTE requested, the FNTE, after lifting the jam, largely succeeded in securing continued non-enforcement.¹⁶⁸

This state of affairs persisted despite the fact that a host of private transport companies vociferously objected to the government's failure to achieve, as they argued, a more competitive, efficient, and just transportation sector.¹⁶⁹ For example, the director of one private bus company told Lakier:

The government does not help us at all in our efforts [to expand service to the West]. In the [Transport] Act it is written that one can conduct service everywhere. Nothing is written against the right to run buses. . . . And yet we cannot. Then what is the fate of this country [if this rule cannot be applied]?¹⁷⁰

164. Lakier, *supra* note 127, at 263-65.

165. *Id.* at 264-65.

166. *Id.*; see also Lakier, *supra* note 163, ch. 2 at 4.

167. The Vehicle and Transport Management Act of 1993 provides for competition in transportation services. Lakier, *supra* note 163, ch. 2 at 4-5. Moreover, in 2001, the national Consumer Protection Council formed under a 1997 Consumer Protection Act officially banned transportation syndicates. Lakier, *supra* note 127, at 263.

168. Lakier, *supra* note 127, at 265.

169. According to Lakier, in 2006 private companies "were still battling to gain new route permits." *Id.*; see also Ratnakar Adhikari, *Political Economy of Syndicate System*, KATHMANDU POST, July 31, 2008, available at <http://www.sawtee.org/uploads/articles/syndicate.php>.

170. Lakier, *supra* note 163, ch. 2 at 44-45 (quoting Interview with Nirmal Rai Majhi, Director of Agni Yatayat bus company, in Kathmandu, Nepal (July 8, 2003)).

The director of another company lamented:

The government cheated us at the Ministry level. At first the government told us to run the bus service with the assurance that we could get the route permit. But 45 days have passed—there has been no change. . . . The problem with Nepal is that there is law but no implementation.¹⁷¹

If one is inclined to see “culture” in the FNTE’s practices of patronage and defiance, then this story does little to undercut a cultural explanation of anti-market (and illegal) behavior, even if it does equally little to reveal what sort of culture change intervention could capably break up this monopoly cartel. But what Lakier proceeds to show is that the extralegal tactics of the *chakka jam* used by the FNTE to undermine the state’s control over violence and markets are also used by ordinary people, *all the time*, to compel the state to enforce the rule of law, as it were, in their lives and communities. Consider this newspaper description of a local *chakka jam*, that occurred on December 9, 2003, and which Lakier describes as a regular, even banal, occurrence:

An accident in Bara district in Bakuliya VDC [village development community] [occurred] at 10:40 in the morning which killed a student from ward 10 of the VDC. As soon as the accident occurred, hundreds of students from the nearby high school closed down the highway for nearly 2 hours. The police reported that they did so in order to ensure appropriate justice and remuneration was handed out. The police then took the driver of the truck to jail, promising necessary punishment.¹⁷²

These students blockaded the highway in defiance of legal order and, seemingly, also in defiance of any procedural safeguards for the accused driver. But they also staged this blockade to *demand* legal order—that is, to demand that the state administer justice in the wake of traffic accidents.

Lakier argues that when a traffic accident occurs on rural roads, particularly in areas with a visible Maoist

171. *Id.* ch. 2 at 45 (quoting Interview with Surya Man Singh, Director of Makalu Transportation, in Kathmandu, Nepal (Aug. 24, 2003)).

172. *Id.* ch. 2 at 23 (quoting the Nepali language national daily, *Rajdhani*, Dec. 10, 2003).

presence, state authorities are often entirely absent. Villagers blockade the roads not only to prevent the offending driver from leaving the accident scene, but also to force the police to show.¹⁷³ Lakier, in fact, asserts that the failure of the police to perform their duties is frequently the very injury villagers protest. In one case, "angry neighbors of an 8 year old child killed by a tractor, first vandalized the vehicle and beat up the driver, and *then* blockaded the road, in order to protest the failure of the police to show up at the accident scene."¹⁷⁴ In another case, citizens blocked a road to protest the failure of police to respond after they were informed of a robbery in a nearby store, and only lifted the blockade when the chief inspector promised to improve law enforcement in the area.¹⁷⁵ In the wake of traffic accidents, road blockades also serve as a means to demand welfare obligations from a host of authorities. Lakier writes that

[i]n one instance . . . the Royal Nepal Army fetched a helicopter from Kathmandu in order to fly a girl whose arm had been broken in an accident with an army truck in Sarlahi district to a nearby hospital. In another incident, the Gorkha International School offered the brother of a five year old child killed by a school bus free tuition until his graduation as a means of ending an almost four hour jam of the road.¹⁷⁶

When the police respond to a *chakka jam*, they typically resolve matters "by impounding both the driver and the vehicle, until money [can] be made available for the family of the injured or dead."¹⁷⁷ And when accidents involve a vehicle affiliated with the FNTE (as many do), compensation is forthcoming from the syndicate boss.¹⁷⁸ In this way, the crowd is "enforcing the principle of compensation laid down in the Transportation Act. Yet . . . in a way that entirely avoid[s] legal procedure even as it

173. *Id.* ch. 2 at 25.

174. *Id.* ch. 2 at 24 (citing the Nepali language national daily newspaper, *Spacetime Dainik*, Nov. 18, 2003).

175. *Id.* ch. 2 at 29 (citing the Nepali language daily, *Kantipur*, May 26, 2002).

176. *Id.* ch. 2 at 26 (citing the Nepali language daily, *Kantipur*, May 22, 2002, and the Nepali language daily *Rajdhani*, Aug. 6, 2002).

177. *Id.* ch. 2 at 27.

178. *Id.*

depend[s] upon and [is] mediated through the figure of the law, the police officer.”¹⁷⁹ Thus, to ensure that they receive compensation, villagers forcibly close down the roads and disrupt the flow of goods and services, but they do so in order to attract the attention of the police. And part of what they are demanding is that compensation be mediated by the police, even as they are simultaneously transgressing law’s terms.

These *chakka jams* therefore are clearly not instances of order without law, or instances of disorder indifferent to law as a disciplining social force.¹⁸⁰ Individuals here use law as an explicit tool of dispute resolution—not only by demanding compensation as legislated by state code, but by demanding that compensation be administered by state law enforcement officials. But although these extralegal demands are anchored to state law, *chakka jams* are also clearly not instances of order that emerge out of law’s shadows, at least in the sense of informal negotiations shaped by enforceable legal defaults.¹⁸¹ Instead, for many who invoke their power, *chakka jams* are a means of making oneself (and one’s associates) visible before the law in order to demand legal remedies but through methods that evade formal legal processes.

For the development practitioner, then, *chakka jams* are paradoxical forms: ordinary citizens regularly exceed law via collective mobilization, but to demand law’s application to their harms.¹⁸² If the rule of law describes “a

179. *Id.* ch. 2 at 33. According to Lakier,

Accident insurance—including insurance for third party injuries—had been required for all drivers and public transport operators since the passing of the Transportation and Public Transport Act in 1995 Section 163 required all public and private transporters to carry accident insurance that pays the victim or victim’s family up to 10,000 rupees in the case of an injury, and 30,000 rupees in the case of a death.

Id. ch. 2 at 21, n.28.

180. See generally ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

181. See generally Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

182. Brooks offers several examples of the complex relations among law, violence, and order. Yet none quite capture this paradigm. To simplify her more nuanced illustrations, she explores a peaceable order without state law

state of affairs in which the state successfully monopolizes the means of violence, and in which most people, most of the time, choose to resolve disputes in a manner consistent with procedurally fair, neutral, and universally applicable rules, and in a manner that respects fundamental human rights norms," then development practitioners should see these practices in tension with the rule of law.¹⁸³ One problem, however, is that even if conflict resolution under the rule of law "depends on the public's confidence and belief in the very idea of law" people here transgress the law in part because they *believe* as much as disbelieve in law's power.¹⁸⁴

The FNTE (who, we should recall, commenced a *chakka jam* to protest lawful private competition) themselves complain of the government's failure to enforce formal, neutral, and predictable legal procedures. One syndicate boss objected to a lack of state supervision and due process protections in the aftermath of traffic accidents:

When third parties are in the road and don't see the bus and get injured . . . the government doesn't *see* what happens and [we are] forced to provide compensation In India, there is a good

exemplified by Robert Ellickson's cattle ranchers in Shasta County, a violent order with state law exemplified by Germany under Nazi rule, a violent "disorder" with state law/law enforcement exemplified by U.S. inner cities, and a violent order without state law exemplified by Albania in the nineteenth century and Somalia in the early 1990s. Brooks, *supra* note 3, at 2306-11.

183. STROMSETH, WIPPMAN & BROOKS, *supra* note 3, at 78. They write further that "[i]n the context of today's globally interconnected world, [the rule of law] requires modern and effective legal institutions and codes, and it also requires a widely shared cultural and political commitment to the values underlying these institutions and codes." *Id.* There are, of course, numerous scholarly efforts to define the rule of law. For a useful summary of basic typologies, see Santos, *supra* note 45, at 256-66 (distinguishing an institutional or procedural conception of the rule of law from a substantive one and an instrumental conception of the rule of law from an intrinsic one). See also Richard J. Fallon Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 10-24 (1997) (setting forth four ideal-type conceptions: the historicist, the formalist, the Legal Process, and the substantive); Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 LAW & PHIL. 137, 154 (2002) (summarizing various lists of features that legal scholars propose should comprise the rule of law). For a detailed historical exploration of the concept, see BRIAN Z. TAMANAHA, *ON THE RULE OF LAW* (2004).

184. Stromseth, *supra* note 3, at 1453 (summarizing STROMSETH, WIPPMAN & BROOKS, *supra* note 3, at 78-80).

system established. When there is an accident, the people involved exchange papers and the police take away the car, maybe, and that is all. But we are very abused, here in Nepal.¹⁸⁵

Another complained of a lack of government regulation more broadly:

In Nepal's context, the government has not been able to make clear policies [regarding transportation] . . . [for example] how are organizations to be registered, how can the government help them, where does their capital come from, how do they take kids, these questions. . . . And in Nepal there aren't options. People don't have cars. . . . I have heard that in Europe, the government manages everything . . . how much time transportation takes etc., they have identified all the needs. . . . But here they have not identified those needs. Therefore, public transportation should be put fully under the government. India is a larger country, much larger than Nepal. And it is fully government-run. This should be also in Nepal. We should calculate: on 100km of road, and here, there is this number of people and over there, that number. How many buses should we need each day, how many public transportation vehicles, etc. . . . This kind of style and standard of bus. . . . After that was finalized, then service would be dependable, *of a standard*.¹⁸⁶

Thus, even members of the FNTE do not appear to wish to replace state authority with that of their own. To the contrary, as these quotations suggest, they desire an overarching state bureaucracy capable of standardizing and monitoring the provision of transportation services, even as they simultaneously reserve the right to disobey some of its terms.

What, then, do endemic road blockades tell us of Nepali people's values and beliefs about law? Individuals here are articulating demands for compensation and social order marked by some sense of shared social meanings, yet meanings that are multiple and riddled with contestation and contradiction. The development practitioner aiming to

185. Lakier, *supra* note 163, ch. 2 at 27 (quoting Interview with Lal Man Bhandari, an official in the Bheri Zonal Bus Association, in Kathmandu, Nepal (Aug. 13, 2003)).

186. *Id.* ch. 2 at 43 n.48 (quoting Interview with Surya Bahadur Bhattarai, General Secretary of the Federation of Nepalese Transport Entrepreneurs, in Kathmandu, Nepal (Aug. 18, 2003)).

strengthen the ends of law and development through culture change therefore faces a daunting interpretative task if she wishes to describe people's values and beliefs as legible and stable in order to render them subject to change: a disposition to protest and disruption?; commitments to feudal forms of social organization that privilege patronage and social networks?; an intense desire for state bureaucracy and a rationalized government order?

Moreover, even if she could describe these values and beliefs accurately,¹⁸⁷ how should she then layer culture *change* onto this example in order to achieve widespread commitments "to the orderly and nonviolent resolution of disputes"?¹⁸⁸ The orderly and nonviolent resolution of disputes appears, to put it bluntly, precisely what a range of actors surveyed here claim to want—the exchange of papers, service that is of a standard, police who arrive, compensation that is forthcoming. It seems clear that *chakka jams* are efforts to enlist law in the service of power enacted through the political association of groups (be they local villagers or syndicalist monopolies) rather than power enacted through the neutral and formally equal application of legal procedure to individual plaintiffs and defendants. However, it seems equally clear that *chakka jams* do not reflect a lack of popular belief in the rule of law or a lack of legal consciousness in any simple or obvious way. Ordinary people are articulating values that are similar to the values that we could imagine the rule-of-law aid community wishes to instill. But the meaning these values signify for the people who hold them, and the relations among the values people hold, the specific contexts in which they act, and the political economies that allow these values and practices to circulate, are no simple matters to untangle—let alone place in any relation to institutional reform.

Lakier describes how in response to the disruptive and unpopular effects of *chakka jams* and *bandhs* or general

187. See, e.g., Bernard E. Harcourt, *After the "Social Meaning Turn": Implications for Research Design and Methods of Proof in Contemporary Criminal Law Policy Analysis*, 34 LAW & SOC'Y REV. 179, 186 (2000) (arguing that policies designed to change the social meanings of discrete practices, such as juveniles who "snitch" on other youths carrying guns, require policy makers to show that "an interpretation of social meaning is not just *plausible* but *correct*").

188. STROMSETH, WIPPMAN & BROOKS, *supra* note 3, at 75.

strikes (which require the cessation of commerce and vehicular travel throughout an entire geographical area), one prominent Nepali NGO, Pro Public, began a culture change campaign.¹⁸⁹ Founded in 1991 to promote the ends of good governance, in 2001, Pro Public invited ordinary citizens to make their voices heard—but through a “Public Hearing,” rather than street protest.¹⁹⁰ More ambitiously, Pro Public initiated a program designed to persuade Nepalis to adopt “A Why Culture,” that is, a culture in which ordinary citizens hold their public officials accountable and responsive to their needs, but through inquisitive, participatory, and civil forms of “asking why” in venues like the public hearing.¹⁹¹ In its literature, Pro Public contrasts these civil practices of question-asking with what it sees as Nepal’s dominant cultural forms: citizens who are either “of docile character,” “indifferent” and with a “traditional mindset of embracing the status quo” or, conversely, citizens who “react[] destructively particularly in matters relating to good governance.”¹⁹² Lakier describes at length how, despite Pro Public’s (as well as other) anti-street protest campaigns, *chakka jams* and *bandhs* persist today. Here, however, let me only note that to describe these forms as *cultural* risks obscuring the ways in which they also represent affirmatively disparate ideals of participation in public life, as well as affirmative political contestation over the kinds of public dissent that are both acceptable and likely to produce movement towards the rule of law.

189. Lakier, *supra* note 163, at ch. 6, *The Problem of the Bandh Redux: Anti-bandh Discourses and the Erasure of the Political*.

190. See Pro Public, <http://www.propublic.org/index.php> (last visited Mar. 31, 2009). To publicize the event, Pro Public ran the following ad in daily newspapers:

Are you truly “sick” of constant Nepal bandhs? If this is so, we are organizing a *PUBLIC HEARING* for the purpose of providing your discontent an outlet. At the program, we are giving you the opportunity to pose your questions, “*keenly but democratically*” and “*pointedly but politely*,” to the organizers of bandhs. Come. Take part! We welcome you to this practice in democracy.

Lakier, *supra* note 163, ch. 6 at 6 (Nepali transliterations omitted).

191. See *id.* ch. 6 at 9-13.

192. PRO PUBLIC, GOOD GOVERNANCE PROJECT 7, 9 (2003) (pamphlet on file with author).

To conclude, this example presents people contesting a multifaceted range of values (competition versus privilege, substance versus procedure, visibility before the law versus obedience to its terms, contentious versus civil forms of political engagement). It does so in order to foreground both the paradoxes and the politics of representing social practices such as *chakka jams* as products of particular values and beliefs so that interveners can change these practices by encouraging individuals to adopt different values and beliefs. To be sure, values and beliefs can change as a result of exposure to new ideas and influences, and new ideas and influences can result from development interventions. My next example examines such an instance. But it illustrates how even successful instantiations of new values can inspire a multiplicity of practices.

C. Women, Empowerment, and Maoists

In Nepal, probably the most extreme manifestation of clashes among various rule-of-law values was the Maoist insurgency itself. After boycotting the 1994 mid-term parliamentary elections and forming a splinter political party, on February 13, 1996, the Communist Party of Nepal (Maoist)¹⁹³ commenced a People's War by attacking agricultural development banks and police posts in the Western region of the country.¹⁹⁴ Ten days prior to the 1996 attack, leading Maoist ideologue Dr. Baburam Bhattarai presented the prime minister with forty demands, which included: ending "patriarchal exploitation and discrimination against women," allowing inheritance rights for daughters, abolishing exploitation and discrimination

193. The Communist Party of Nepal (Maoist) describes its vision as the "creative application of Marxism-Leninism-Maoism [to the] concrete reality of Nepal." Press Release, Communist Party of Nepal (Maoist), Central Committee (Dec. 26, 2007), available at http://krishnasenonline.org/Bulletin/press_release.html. Its slogan is "Long live Marxism-Leninism-Maoism & Prachanda path." Prachanda, the *nom de guerre* of Pushpa Kamal Dahal, is the Maoist party chairman and, at the time of this writing, is also Nepal's newly elected prime minister. For more information on Nepali Maoism and its relation to the ideas of Marx, Lenin, and Mao, see the party website, <http://www.cpnm.org>.

194. See Karki & Seddon, *supra* note 134, at 22-23; see also Deepak Thapa, *The Maoist of Nepal*, in STATE OF NEPAL 77 (Kanak Mani Dixit & Shastri Ramachandaran eds., 2002).

based on race, caste, and ethnicity, equal language rights, freedom of press and publication, special legal and social protections for orphans, disabled, and elderly persons, as well as comprehensive land reform, employment for all, strict enforcement of minimum wage laws, loan forgiveness for small farmers, free health and education services, and the elimination of corruption and bribery.¹⁹⁵ These are goals, in short, that could easily appear on the programmatic agendas of a number of mainstream law and development projects committed to economic development, egalitarian market participation, and international human rights.

Notwithstanding many goals laudable from a liberal legal perspective, Bhattarai's demands were articulated via violence from the insurgency's beginning. In 1995, the party declared that "the greatest responsibility has fallen upon the revolutionaries to initiate armed struggle against feudalism [and] imperialism."¹⁹⁶ And, indeed, soon after that declaration, Maoists began to "attack police stations and army garrisons, set off explosions, [and] implement 'people's action' against those seen as 'class enemies,' 'informers,' and 'spies.'"¹⁹⁷ In 2003, these actions prompted the United States to designate the Communist Party of Nepal (Maoist) a "Specially Designated Global Terrorist" organization posing a significant risk to U.S. interests.¹⁹⁸

But notwithstanding the Nepali Maoists' public use of

195. Baburam Bhattarai, *40-Point Demand*, in UNDERSTANDING THE MAOIST MOVEMENT OF NEPAL, *supra* note 142, app. at 391-95. Other demands included stopping the "invasion of colonial and imperial elements in the name of NGOs and INGOs" and banning "imperialist and colonial culture" such as "[v]ulgar Hindi films." *Id.* app. at 393.

196. Fujikura, *supra* note 146, at 26 (quoting *Strategy and Tactics of Armed Struggle in Nepal*, a resolution adopted in 1995 by the Third Plenum of the Central Committee of the Communist Party of Nepal (Maoist)).

197. Thapa, *supra* note 194, at 77.

198. Determination Pursuant to Section 1(b) of Executive Order 13224 Relating to the Communist Party of Nepal (Maoist), 68 Fed. Reg. 62158 (Oct. 31, 2003). At the time of this writing, the designation still stands. As a result, Maoists are "excludable from entry into the United States," and U.S. citizens are barred "from transactions such as contribution of funds, goods, or services to, or for the benefit of, the Maoists." See Press Release, Bureau of Consular Affairs, Department of State, *Travel Warning Nepal*, http://travel.state.gov/travel/cis_pa_tw/tw/tw_927.html (last visited March 1, 2009).

violence, it is equally the case that from the beginning, Bhattarai's demands were aimed at replacing an "all-powerful autocratic monarchy" with a "bourgeois democratic republic" through elections to a constituent assembly.¹⁹⁹ As scholars of Nepal explain, Maoist demands "for a constituent assembly, a new, more democratic constitution and the establishment of a popular democratic republic in Nepal . . . were, from the very early days of the Communist Party of Nepal, central and major objectives."²⁰⁰ Or in Bhattarai's words:

Our party, our party Chairman Prachanda and our various publications have time and again stressed that our immediate political agenda is to consummate a democratic republic in the country. Please note that we are not pressing for a 'communist republic' but a bourgeois democratic republic. For that we have advanced the immediate slogans of a roundtable conference of all the political forces, an interim government and elections to a constituent assembly, which have been increasingly endorsed by an overwhelming majority of the population. As the constituent assembly is the highest manifestation of bourgeois democracy in history, we fail to understand why anybody claiming to be a democrat should shy away from this.²⁰¹

Although a thorough analysis of the Nepali Maoist movement, and its complex and contentious relation to the Nepali state is beyond the scope of this Article, a glimpse at the strikingly high rate and visible roles of rural women participating in the Maoist struggle provides another fruitful point of analysis for neocultural interventionist projects. Many scholars have documented the various roles of women in the Maoist movement; women participate "as cultural activists, members of village defender groups, couriers, guides, nurses . . . combatants and spies."²⁰² And according to Hisila Yami, wife of Bhattarai and former head of the Women's Front, "in the Maoist strongholds, every third guerilla is a woman. In the new districts . . . every tenth combatant is a woman. . . . Some of the most violent

199. Email Interview by Chitra Tiwari with Baburam Bhattarai, in UNDERSTANDING THE MAOIST MOVEMENT OF NEPAL, *supra* note 142, at 329, 331.

200. Karki & Seddon, *supra* note 134, at 3.

201. Tiwari, *supra* note 199, at 331.

202. Gautam et al., *supra* note 144, at 114.

actions against local 'tyrants' are associated with all-women guerilla squads."²⁰³ Comrade Parvati, another leading female Maoist figure, similarly argues that the "Marxist-Leninist-Maoist forces are steeling women to strike violently against the system that has been responsible for their double exploitation."²⁰⁴

The conventional diagnosis of the radicalization of rural Nepali women (as well as men and youth) blames poor governance for failing to meet the needs of those in poverty and despair—what some scholars term the "failed development thesis."²⁰⁵ A good example of this thesis is proffered by USAID in its 2004 Congressional budget justification: "poor governance and corruption . . . and lack of infrastructure all contribute to its development gains being unevenly distributed The Maoist insurgency . . . has found fertile ground largely in response to Nepal's poverty, exclusion, and poor governance."²⁰⁶

The Maoists, for their part, both embrace but also resist this diagnosis. They explain their affirmative ideological agenda more readily through a global structural critique of "gross inequality, oppression, poverty, underdevelopment and exploitation of the overwhelming majority of the population in a class-divided and imperialism-dominated world" rather than (or in addition to) evidence of development's incomplete unfolding in Nepal.²⁰⁷ As Maoist Chairman Prachanda explains: "For the masses there is no alternative to rebellion and revolution, given the objective background of exploitation, repression and poverty

203. *Id.*

204. Comrade Parvati, *Women's Participation in the People's War*, in THE PEOPLE'S WAR IN NEPAL, *supra* note 134, at 165, 182. For other analyses of the role of women in the Maoist movement, see LI ONESTO, DISPATCHES FROM THE PEOPLE'S WAR IN NEPAL 166, 164-82 (2005) (describing how many "women really believe that the fight against women's oppression is woven into the fabric of this People's War"); Shakya, *supra* note 149, at 375-404.

205. For detailed descriptions of this position, see generally Fujikura, *supra* note 146; Lauren Leve, "Failed Development" and Rural Revolution in Nepal: Rethinking Subaltern Consciousness and Women's Empowerment, 80 ANTHROPOLOGICAL Q. 127 (2007).

206. USAID, BUDGET JUSTIFICATION TO THE CONGRESS 1 (2004), http://www.usaid.gov/policy/budget/cbj2004/asia_near_east/Nepal.pdf, quoted in Leve, *supra* note 204, at 138.

207. Tiwari, *supra* note 199, at 329.

prevalent in the semi-feudal and semi-colonial countries of the Third World.”²⁰⁸ As one potential illustration of the ideological difference between the USAID and the Maoist positions, consider the response of one Maoist to the common refrain that the advent of national education that exceeded employment opportunities for rural Nepali youth led many of these unemployed youths to embrace the Maoist cause. “If unemployment was the reason,” this Maoist youth argued, “it would have made us not Maobadis (Maoists), but Jagiri-badis (Employment-ists).”²⁰⁹

In response to the “failed development” thesis (in either of its USAID or Maoist formulations, which, in different ways, link the insurgency to development’s failures), some activist scholars have examined how the *successes* of development—its values, products, and techniques—may have created new collective political imaginations that enabled Nepali Maoist ideologies to take root. Consider, for example, Fujikura’s analysis of Nepali education. He examines how a modern system of national education fostered collective ideals sympathetic to the Maoist agenda. He argues that “for the past several decades in Nepal, the project of national development aggressively promoted a view that it was necessary to have a formal education in order to become a kind of person who could help others and that, as an educated person, the primary way to help others was through helping to develop the nation.”²¹⁰ He proposes that the diffusion of this view paradoxically aided the Maoists in fostering “a particular—revolutionary—way of envisioning the world” that included “the absolute imperatives of progress and improvement, necessity of a radical rapture with the past in order to bring out authentic progress, a group of educated ‘youth’ as those privileged to bring about that change, and the Nepali nation as both the object and ground for real development.”²¹¹

Human rights activists and scholars Shoba Gautam, Amrita Banskota, and Rita Manchanda proffer a similar claim about women’s empowerment. As early as 1995, the

208. *Interview with Comrade Prachandra, in UNDERSTANDING THE MAOIST MOVEMENT OF NEPAL, supra* note 142, at 211, 212.

209. Fujikura, *supra* note 146, at 24.

210. *Id.* at 25.

211. *Id.* at 28.

USAID Mission in Nepal redirected significant amounts of funding from programs to reform parliamentary and judicial institutions to programs to train rural women in "basic literacy, legal literacy, and economic literacy."²¹² Nepal, in fact, was one of the first countries to see women's empowerment as a USAID "strategic objective."²¹³ And anthropologists have long since criticized women's development programs in Nepal for seeking to cultivate neoliberal forms of personhood—what Katharine Rankin calls "rational economic woman."²¹⁴ Gautam, Banskota, and Manchanda, however, argue that at least among women in the western Gorkha district, woman's empowerment has promoted a very different kind of female subject. These scholars suggest that Gorkhali women's support for the Maoist insurrection reflects the achievements of a local development program to change how women comprehend themselves and how they comprehend concepts like justice and equality.²¹⁵ More specifically, Gautam, Banskota, and Manchanda draw links between a U.S. INGO program administered in the 1980s (prior to the USAID push²¹⁶) to engage rural Gorkhali women in topics such as poverty, gender inequality, and corruption as a means to promote literacy and empowerment, and the fact that many of the subsequently empowered women supported the Maoist

212. CAROTHERS, *supra* note 1, at 116-17. Carothers reports that this "go local" trend in Nepal" reflected budget cuts as well a perception that political elites were unresponsive to USAID's reform efforts. *Id.* at 117, 319. Leve, who refers cynically to USAID's women's empowerment projects in Nepal as "literacy-law-and-loan" programs, reports that in one year alone USAID "enrolled over 100,000 women in six or nine month literacy courses . . . , [n]early 43,000 women 'were provided legal awareness and advocacy skills,'" and many thousands were given access to micro-credit. Leve, *supra* note 205, at 140-41.

213. Lauren G. Leve, *Between Jesse Helms and Ram Bahadur: Participation and Empowerment in Women's Literacy Programming in Nepal*, 24 POL. & LEGAL ANTHROPOLOGY REV. 108, 112 (2001).

214. Katharine N. Rankin, *Governing Development: Neoliberalism, Microcredit, and Rational Economic Woman*, 30 ECON. SOC'Y 18 (2001); *see also* Leve, *supra* note 213, at 119.

215. *See* Gautam et al., *supra* note 144, at 120-22.

216. Unlike literacy courses today, which Leve argues are "treated primarily as a lead-in to income generation classes, microcredit programs, or savings and loan groups," this older U.S. INGO-sponsored literacy program was modeled after Brazilian pedagogist Paulo Freire's democratic approach to adult education and community self-help. Leve, *supra* note 205, at 135.

uprising for its democratizing ends.²¹⁷

Quantitative and qualitative research over a ten-year period suggests that the literacy program in Gorkha achieved many of its intended effects: graduates expressed greater confidence, willingness to speak in public, and support for the education of girls and equal treatment of sons and daughters. And the Gorkha district boasts female literacy rates slightly higher than the national average.²¹⁸ Additionally, at least according to Gautam, Banskota, and Manchanda:

In Gorkha district, it is literate women and men who are joining the struggle. Ironically, it is the success of the adult literacy campaign which has paved the way for women to become active in the public life of the community, for girls to go to schools and for girls politicised in school to be drawn into the armed struggle.²¹⁹

And:

Young women have been politicised in schools, the adult literacy classes and NGO-sponsored income generation women collectives. . . . Literacy campaigns supported by INGOs designed to promote the empowerment of women, inadvertently encouraged many conscientised young women to choose subsequent empowerment through armed struggle.²²⁰

The Gorkhali women did not become rebel guerrillas, but they provided Maoists with material and ideological support and protection. As Leve explains, these women “support the rebels by feeding them, housing them, and, most importantly, not informing the government about their activities or whereabouts. . . . [W]ithout their support, these women told me, the insurgents would be lost.”²²¹ Thus like the families of victims of traffic accidents staging *chakka jams*, these “ordinary” women appear to act in the name of values such as equality and social justice. But they do so through support for public and private violence that preempts or subverts the predictable, bureaucratic, and

217. See Gautam et al., *supra* note 144, at 120-22.

218. *Id.* at 120.

219. *Id.* at 120.

220. *Id.* at 121.

221. Leve, *supra* note 205, at 131.

rule-bound operation of legal processes. These efforts, again, are in tension with most accounts of the rule of law that rest "significantly on the assumption that legal process is superior to violence as a means of resolving conflicts."²²²

In an effort to make sense of these women's radicalization, Leve (who had worked previously with this and many USAID women's empowerment programs in Nepal) visited Gorkha with the aim of discovering "a sense of what was important to them and what sort of people they think themselves to be."²²³ She spoke with graduates whose narratives clearly support Gautam, Banskota, and Manchanda's claim that successful development programs helped align these women with the Maoist agenda. "When I asked one woman about why people in [the area] supported the insurrection," Leve writes, "her answer was succinct: 'the Maoists work for social justice' When I asked her if she remembered when she first began to use that term and/or the ideals it expresses, she thought for a moment and then replied: 'in the adult literacy course.'"²²⁴

For her part, however, Leve tries to understand the Gorkhali women's support for the Maoist insurgency not simply as "empowerment"—a concept that rests on modernist notions of individual consciousness, autonomy, and agency. And she reports narratives that are ambivalent and in many senses prosaic.²²⁵ Many women in Gorkha expressed clear objections to "the violence and everything that came with it."²²⁶ Yet many blamed politicians and democracy—not the Maoists—for the material insecurity and violence in their lives, and urged the government to concede the Maoists' demands.²²⁷ But some were nonetheless opposed to the Maoists' efforts to emancipate women through the eradication of gendered custom and ritual observances and preferred to maintain traditional practices such as the observance of menstrual taboos.²²⁸

222. STROMSETH, WIPPMAN & BROOKS, *supra* note 3, at 312.

223. Leve, *supra* note 205, at 163.

224. *Id.* at 137.

225. *See id.* at 141-42.

226. *Id.* at 159.

227. *Id.* at 148.

228. *Id.* at 148-49, 162.

And most spoke to Leve of their desires and allegiances not by discussing revolutionary agency and radical consciousness (or even social justice, for that matter), but rather by discussing ordinary and relational commitments: being the sort of person who is willing to make sacrifices on behalf of others, negotiating their families and their social obligations, and desiring things like “ease, security, equality of opportunity (including access to education and employment), good food and clothing, some degree of respect for their personal desires—and, as much as possible, some fun.”²²⁹

Leve proceeds to describe how two oppositional ideas—“self-interest versus being-for-others, and pain and trouble versus ease and fun”—shaped, in different ways, the thinking of many women she encountered.²³⁰ To offer a striking example, one very successful graduate of the literacy program accepted employment with the police academy in Kathmandu. Although her vocation made her a Maoist target, she too supported the insurrection. In her words:

What can we do? It's difficult. We have to educate our children. . . . Who wouldn't want to live having fun? No one wants to face such pain, do they? At night when we sleep in our room, if someone knocks on the door, we feel they've [Maoists have] come to kill us. That's the kind of fear we live with. . . . What they [the Maoists] are doing is good. They're doing it for us. It's very good to say that rich and poor will be the same. We're scared because they will kill us because of our jobs, and it shouldn't be like that. We are doing these jobs because we have to. Otherwise, though, they're [Maoists are] not bad. Actually, if police/army recruits die and if Maoists die, it's the same—all are sons and daughters of Nepal. But they [Maoists] aren't fighting for personal benefit. They're fighting without any salary, but we're fighting for our personal benefit. In a way, we're selfish. Because if we don't have a job, we won't be able to feed our kids, so we've become involved. But they don't get a

229. *Id.* at 151. Leve writes further that “‘Development’ (*bikās*) might also be placed on this list. If so—again based on what they told me—it would include water taps, electricity, bridges and roads, and peace.” *Id.* at 166 n.43. She describes these expressions as striking because the women “were almost certainly familiar” with Maoist critiques of “development as a form of violent imperialism,” *id.* at 158, and, as such, Leve suggests they could reflect genuine political commitments as well as rhetorical opportunism (given Leve’s own links to development programs). *Id.* at 167 n.51.

230. *Id.* at 150 (Nepali transliterations omitted).

salary. They're fighting knowing that they may die today or tomorrow. We're fighting for our own self-interest, and they're fighting for the country.²³¹

The implications of these values and desires—to live a life with fun, to live with the absence of violence and pain, to live under social conditions of class equality, to sacrifice oneself for others, to educate one's children, to be selfless in the face of the demands of a nation—for the failures and successes of development, and their relation to why people do or do not support armed struggle, are too large and surely too indeterminate to tangle with here.²³² But what Leve's ethnography clearly demonstrates is how impoverished culture change becomes when it is articulated as a set of normative prescriptions (any set) extracted from the structural, material, interpersonal, and psychological contexts that allow analysts to use culture to produce knowledge about people that is both legible and enduring as well as simultaneously unstable and beyond the grasp of any easy or generalizable development expertise. At bottom, Leve's ethnography is an effort to make sense of the ways in which these women's desires, choices, and relationships reflect continuities with prior forms of social organization, and, to the extent they reflect breaks, what those breaks mean to the Gorkhali women who embody them in particular historical, social, and political contexts.

Be it through legal rights education, women's literacy, or micro-finance, neocultural interventionists have proposed that local development programs can generate processes of self-transformation that produce both marked and manageable change. That is, these programs would produce people who come to hold *different* values and self-understandings about law and development yet who willfully channel these values into behaviors that follow predictable and manageable directions (such as towards liberal institutions comprising the rule of law and not towards street protests or radical social movements). But Leve's example stands suggestively to complicate both these ends. The problem Leve uncovers for culture change projects is not that the Gorkhali women either changed or

231. *Id.* at 149-50.

232. *See id.* at 160-62.

failed to change as a result of women's empowerment projects—some clearly articulated what appear to be new or enhanced cultural commitments to values and practices desirable from a liberal rule-of-law perspective, such as the education of girls, market employment, and other forms of social equality. Rather, the problem resides in deciphering, let alone driving, the degree and direction of these self-transformations abstracted from the social conditions that help to shape both these “selves” and their potential continuities and transformations.

IV. LESSONS FROM ETHNOGRAPHY

I have argued that the neocultural interventionist paradigm conceptualizes culture in two related forms: first, as conscious values and beliefs that individuals possess, and, second, as lawlike social rules that produce social behavior and social relations in reasonably predictable ways and, once changed, can produce social behavior and social relations in reasonably predictable different ways. My examples, however, suggest that deploying these conceptualizations of culture as the basis of social change projects can involve particular kinds of limitations and forms of misrecognition. Grappling with these limitations and forms of misrecognition is crucial because, as I see it, the very reason to think with culture in law and development is because it compels to remember that questions of development always involve questions of how we understand *people*.²³³

A. *Culture as Consciousness*

We have seen people who, rather than lack conscious desires for either the substantive or procedural values that development and the rule of law are thought to encode, instead articulate explicit desires for the kinds of values

233. In some contemporary contexts, moreover, the stakes of thinking with culture are quite high. Consider the U.S. Military's “Human Terrain System,” a program to enlist anthropologists to produce knowledge about people in Iraq and Afghanistan. See Kambiz Fattahi, *US Army Enlists Anthropologists*, BBC NEWS, Oct. 16, 2007, <http://news.bbc.co.uk/1/low/world/americas/7042090.stm>; David Rohde, *Army Enlists Anthropology in War Zones*, N.Y. TIMES, Oct. 5, 2007, at A1.

neocultural interventionist projects may wish to instill. One problem, it thus seems, with conceptualizing culture as the values and beliefs that individuals possess is that similar values and beliefs across different contexts can be difficult to observe. Crowds of people that blockade roads in the aftermath traffic accidents can reasonably appear to a development practitioner as instances of lawlessness accompanied by the values and beliefs (whatever these are) that underlie a lawless state of affairs. Or, they could appear, as they do in Lakier's ethnography, as performative interventions intended to trigger the application of law in a substantive form (compensation) and arguably also in a non-bureaucratic and quasi "procedural" form (compensation administered by state law enforcement officials).²³⁴

Describing development challenges through ethnographic detail therefore not only reveals how programs designed to instill general values and beliefs into ordinary people can sometimes be redundant. It also reveals how specific normative labor is always involved in interjecting "local context" into acontextual projects of law reform—and hence challenges neocultural interventionists to articulate more precisely the specific normative assumptions motivating their programs to use culture to change people, opening these assumptions to question and debate. Consider, once more, the different forms programmatic interventions would likely take if development planners described *chakka jams* as a manifestation of people's inadequate legal consciousness or cultural relation to law (and therefore perhaps amenable to pedagogical efforts to instill "A Why Culture") or, conversely, as an illustration of people's disparate, even paradoxical, views about the role of coercive protest to compensate for an inadequate state bureaucracy and to demand legal reform.

Neocultural interventionists are looking for alternatives to help answer some of the most intransigent rule-of-law problems on the ground. They have proposed working in the domain of culture as means of understanding and, if possible, trying to reform ordinary citizens' values and beliefs about development and the rule of law. But, as we have seen, the analytical categories they wish to reform—values and beliefs—are capable of holding multiple and

234. See *supra* Part III.B.

shifting forms of meaning. One consequence of this ambiguity is that culture change projects can not only routinely fail to produce their intended effects, they can simultaneously *succeed* in keeping practitioners ever-hopeful of culture's power. Culture change can always appear to be a goal within reach—planners may need to readjust their methods, scale them down, make them, this time, perhaps less technical and more about people's "actual" values and beliefs.²³⁵ But there is a far more basic normative problem lurking beneath efforts to change popular consciousness to strengthen law. Most succinctly put, based on the values they articulate and practices they enact, are the people staging *chakka jams* believers in or believers against development and the rule of law?²³⁶

235. Other scholars have documented a tendency among planners to represent contestational practices as amenable to reform through the tools of policy expertise. In development literature, anthropologist James Ferguson offers a classic account of this thesis. See generally JAMES FERGUSON, *THE ANTI-POLITICS MACHINE: "DEVELOPMENT," DEPOLITICIZATION, AND BUREAUCRATIC POWERS IN LESOTHO* (1990). As one example, consider Cynthia McClintock's argument against claims that peasant orientations are highly resilient to change. She examined the left Peruvian government's efforts in the 1960s and 1970s to promote a new ethos of "self-management." CYNTHIA MCCLINTOCK, *PEASANT COOPERATIVES AND POLITICAL CHANGE IN PERU* 14 (1981). What she describes are complex processes of self-transformation: peasants who properly transformed hierarchical and deferential orientations into collaborative and assertive ones within new agrarian cooperatives, yet who simultaneously "did not seem to worry whether or not satisfaction of their needs would hurt other peasants in the area [outside of the cooperative], or whether or not their action would damage the cooperative movement as a whole." *Id.* at 18. Based on this data, McClintock reasons that the challenge confronting other policy makers who wish to engage in similar projects of individual reform is not that "citizens' attitudes and behavior change too slowly." *Id.* at 20. Rather the task is figuring out how to craft "new structural amalgams and incentives" capable of transforming attitudes and behaviors in ways that are more in line with policy makers' ultimate goals. *Id.* Failure, in McClintock's analysis, as in many others, thus becomes a bid for better planning and techniques. Cf. Jorge L. Esquirol, *The Failed Law of Latin America*, 56 AM. J. COMP. L. 75 (2008) (exploring how a discourse of "failed law" in Latin America serves principally to justify ever more projects aimed at reforming law and legal institutions in the region).

236. See generally Waldron, *supra* note 184. Building on linguistic philosopher W.B. Gallie's idea of essentially contested concepts, Waldron suggests that the rule of law comprises rival conceptions each vying to capture a shared ideal, but the ideal and the normative purposes it serves are themselves subject to debate—to articulate them is to participate in the contestation. *Id.* at 148, 151, 158-59.

B. Culture as Lawlike Rules

I also argued that the neocultural interventionist project conceptualizes culture as a surrogate to the instrumental and regulatory force of law. It does so when it envisions that culture change can produce reasonably predictable changes in social behavior in contexts where projects of legal change alone appear incapable of achieving similar regulatory ends. To complicate this vision, I offered Fitzpatrick's representation of culture as a relation between social meaning that is capable of producing determinate social effects *and* meaning that is always liable to produce a multiplicity of social practices because it remains responsive to other social and material structures. As a suggestive illustration, I offered Leve's description of women graduates of empowerment programs who, once "empowered," cast their lot with Maoist insurgents fighting on behalf of what insurgents represented as (and what in the early months of the Maoist coalition government now actually appear to be) liberal political and economic ideals.²³⁷

237. The Maoists have recently extended their longstanding dual political commitment to "the bullet and the ballot" to a moderate public-private approach to economic policy. In a recent meeting between Prachanda and the Nepali business community, Prachanda spoke of "fusion theory" modeled on the economies of Malaysia and South Korea. Josy Joseph, *Maoists Talk Peace with Nepali Businessmen*, DNA-WORLD (Apr. 17, 2008), available at <http://www.dnaindia.com/report.asp?newsid=1160065>. Similarly, in a recent interview, Bhattarai explained that:

[w]hen we say we want to end feudalism, we don't mean we want to end private ownership. Our economic development is in our language bourgeoisie democratic revolution, in other words, collectivisation, socialisation and nationalisation is not our current agenda. All we mean to say is that for a weak and backward economy like ours the state must play a facilitating and regulatory role. Without monetary and tax policies foreign interests may be more dominant, so the state has to protect the domestic private sector and the free market. . . . We would like to assure everyone that once the Maoists come [into government] the investment climate will be even more favourable. . . . Our other agenda is economic development and for this we want to mobilise domestic resources and capital, and also welcome private foreign direct investment. The only thing we ask is to be allowed to define our national priorities.

Interview with Baburam Bhattarai, Nepali Maoist Leader, <http://worldviewsblog.blogspot.com/2008/04/interview-with-baburam-bhattarai-nepali.html> (Apr. 17, 2008, 01:04:00 PM).

To be sure, culture, like law, *can* offer resources to mobilize social change in specific normative directions, and cultural interveners can contribute to those processes. My own research during a year spent living in Nepal examined some such positive instances. I studied donor-funded mediation projects that emerged out of a development agenda dedicated to decentralization and court reform. In particular, I studied how activist NGOs added the language of democracy and international human rights to U.S. mediation's language of interests and efficiency.²³⁸ Along precisely the lines Stromseth, Wippman, and Brooks suggest,²³⁹ a group of NGOs used mediation as a forum to promote a "democratic attitude and an attitude of legality" and to challenge "traditional practices and superstitious beliefs that lead to the violation of human rights."²⁴⁰ In fact, local organizers explicitly conceived of mediation trainings as consciousness-raising meetings; as one NGO director put it: "everyone brings their voice to talk about rights . . . this [project] is also about raising awareness among the general population."²⁴¹ And at least among some local users, these mediation projects were producing some of their intended cultural effects.²⁴² Female participants, for instance, reported that they used mediation to make interior representations on behalf of themselves in public and cognizable terms and to make their abuses and abusers

238. Amy J. Cohen, *Debating the Globalization of U.S. Mediation: Politics, Power, and Practice in Nepal*, 11 HARV. NEGOT. L. REV. 295, 337-51 (2006).

239. STROMSETH, WIPPMAN & BROOKS, *supra* note 3, at 338-40.

240. Cohen, *supra* note 238, at 325, 344 (quoting THE CTR. FOR VICTIMS OF TORTURE, ACCESS TO JUSTICE THROUGH COMMUNITY MEDIATION: ANALYSIS OF CASES 1 (2004), available at <http://www.cvict.org.np/pub.html>); cf. Stacy Leigh Pigg, *The Credible and the Credulous: The Question of "Villagers' Beliefs" in Nepal*, 11 CULTURAL ANTHROPOLOGY 160, 163-65 (1996) (exploring how cultural distinctions between modernity and tradition construct local as much as global discourses).

241. Cohen, *supra* note 238, at 340 (quoting Interview with DN Parajuli, Director, Human Rights Forum, in Ilam, Nepal (Mar. 17, 2003)) (transcript on file with author).

242. The project's ultimate aim—that the local invocation of a transnational vocabulary of human rights through village-level mediation would over time have constitutive effects not only among local users, but through such users, the state—was, of course, far more difficult to find any empirical evidence in support. See *id.* at 345.

publicly known.²⁴³

But these intended cultural effects only capture part of a complex story. Indeed, part of what Leve's ethnography suggests is that neocultural interventionists need not only "adapt" transnational development discourses to fit the lives of ordinary people. They also need to attend to the constitutive effects of these discourses on social life as ordinary people reproduce them through repeated social practices in specific contexts.²⁴⁴ For example, many female mediation participants described the empowering and equalizing effects of mediation by contrasting themselves with other women—specifically, women with "low consciousness" or with consciousness yet to be raised.²⁴⁵ Fujikura has observed that "development discourses in Nepal have not only insistently labeled those identified as the 'underdeveloped' part of the population as somehow lacking in consciousness, but have also helped create conditions in which variously positioned people speak in terms of the state of their own and others' consciousness."²⁴⁶

243. *Id.* at 345-46.

244. For ethnographic descriptions of what anthropologist Sally Engle Merry refers to as the "vernacularization," or the appropriation and translation, of global discourses of human rights, see SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* (2006).

245. Cohen, *supra* note 238, at 346.

246. *Discourses of Awareness*, *supra* note 151, at 271. For other explorations of the ways in which discourses of development have shaped self-understandings and social relations in Nepal, see LAURA M. AHEARN, *INVITATIONS TO LOVE: LITERACY, LOVE LETTERS, AND SOCIAL CHANGE IN NEPAL* (2001); Leve, *supra* note 212; Stacey Leigh Pigg, *Inventing Social Categories through Place: Social Representations and Development in Nepal*, 34 *COMP. STUD. SOC'Y & HIST.* 491 (1992). For an account of how development discourses produce knowledge about development beneficiaries for development planners, see Seira Tamang, *The Politics of 'Developing Nepali Women,'* in *STATE OF NEPAL*, *supra* note 193, at 161, 165-66. Tamang, a Nepali scholar and activist, argues:

Whether as "expert consultant," office worker or field officer . . . "upper-caste" Hindu women [perform] the key role of "native informants" for the non-Nepali speaking donor experts and aid bureaucrats. [They are] [u]nquestioned in their authority—being Nepali and being female—to produce information about "Nepali women". . . . The continual use of the term "Nepali women are . . ." and "Nepali women need . . ." by these representatives helps create and propagate the omnipresent fictive "Nepali *mahila* [woman]": uniformly poor, illiterate and choked by

And in mediation, as in many other development projects in Nepal, participants used vocabularies of development to reproduce local hierarchies (gender, class) as well as to contest them.²⁴⁷

I have therefore proposed a more intimate engagement between neocultural interventionist proposals to deploy lawlike conceptualizations of culture to change social behavior with ethnographic observations that suggest culture can represent meanings that are simultaneously too precise and grounded in context and practice, on the one hand, and too unstable and indeterminate, on the other, to pursue particular policy ends. I conclude this Part with a description of the constitutive relation between law and culture that probably best captures my pastiche of examples.

Consider Robert Cover's foundational linkage of law and culture or, more specifically, his insight that "[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning" and that therefore the "creation of legal meaning—'jurisgenesis'—takes place always through an essentially cultural medium."²⁴⁸ Neocultural interventionists link law and culture in an analogous way. Brooks, for example, argues that "[i]n some societies that lack a shared normative commitment to the rule of law," law is unlikely to have any immediate effect on ordering, distributing, or giving meaning to experiences like violence and suffering.²⁴⁹ "Only nonlegal initiatives" that offer "alternative narratives that assign new cultural meaning to violence and suffering" potentially can.²⁵⁰ This is why, to articulate Brooks' prescriptions in Cover's terms, she aims to enlist development practitioners in, quite literally, the "world-creating" practice of making legal meaning through what

Hindu patriarchal domination, not to mention tradition and superstition. . . . As subjects of "development," then, the women of Nepal are homogenised as those "who do not know" and who are in need of having "their consciousness raised."

247. See Cohen, *supra* note 238, at 347, 351 n.193.

248. Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV 4, 4-5, 11 (1983).

249. Brooks, *supra* note 3, at 2322.

250. *Id.*

Cover calls paideic modes of engagement: projects that are pedagogical, person-specific, and marked by the production of common narratives.²⁵¹

But what Cover proceeds to argue is that intrinsic to the world-creating practice of making legal meaning is "the problem of the multiplicity of meaning—the fact that never only one but always many worlds are created by the too fertile forces of jurisgenesis."²⁵² "Let loose, unfettered," he writes, "the worlds created would be unstable and sectarian in their social organization, dissociative and incoherent in their discourse, wary and violent in their interactions."²⁵³ We therefore need law—in its "world-maintaining" form—not to create, but rather to work upon, regulate, and channel plural sites of legal meaning into an organized and disciplined form of social order. Thus, "the sober imperial mode of world maintenance holds the mirror of critical objectivity to meaning, imposes the discipline of institutional justice upon norms."²⁵⁴ Norms, in this mode, "are universal and *enforced* by institutions. They need not be taught at all, as long as they are effective."²⁵⁵

Cover thus places the generative work of creating legal meaning in tension with the imperial work of maintaining legal order. By contrast, neocultural interventionists hypothesize that culture change interventions can induce people to create new substantive sources of legal meaning that can in turn help to produce universalizing and self-disciplining legal forms. In other words, where Cover appears to see culture as a location of contested legal meanings that generate, but also require, law in its imperial form to impose definitional clarity onto plural sites of meaning, the turn to culture in law and development sees culture as a medium through which individuals can potentially, albeit not easily, reach agreement on the value of imperial law.²⁵⁶

251. Cover, *supra* note 248, at 12-13.

252. *Id.* at 16.

253. *Id.*

254. *Id.* Cover writes further: "[We unleash] upon the fertile but weakly organized jurisgenerative cells an organizing principle itself incapable of producing the normative meaning that is life and growth." *Id.*

255. *Id.* at 13.

256. Brooks, for example, describes the rule of law as grounded in a

Or to put this one final way, even if the neocultural interventionist project achieves a shift location and scale—from judges and lawyers to mediators, paralegals, and ordinary people—the practices people engage in, and the extant meaning they ascribe to these practices are, as Fitzpatrick suggests, historically and contextually situated and enduring *and* emergent, dynamic, and responsive.²⁵⁷ This is why we should *expect* interventions aimed at reorienting people, and their legal values, beliefs, and practices, to run directly into Cover's observation "that never only one but always many worlds are created by the too fertile forces of jurisgenesis."²⁵⁸ This is also why I am proposing we should attend to the dangers that can flow from representing culture—a form of social ordering invariably linked to material and social conditions and sites of social struggle—as virtually analogous to an (idealized) image of law: as explicit social rules capable of inducing social change in a reasonably predictable normative direction. On the one hand, deploying homologous representations of law and culture as the basis of development projects may simply mean that exporting projects of culture change, just like exporting projects of legal change, will produce some successes, many failures, and a host of unintended effects. On the other hand, efforts to evolve lawlike conceptions of culture risk obscuring the emancipatory and violent forces that can inhere in the tensions and indeterminacies of culture itself.

CONCLUSION

I am not suggesting that culture change projects will have no effect, positive or negative, on the ground. As anthropologist James Ferguson puts it: "intentional plans are always important, but never in quite the way the planners imagined. . . . intentional plans interact[] with unacknowledged structures and chance events to produce unintended outcomes which turn out to be intelligible not

collective decision: "When societies decide that law is a good mechanism to regulate and assign meaning to violence, changes in formal law can indeed lead to changes in the amount and nature of violence." Brooks, *supra* note 3, at 2322-23.

257. See Fitzpatrick, *supra* note 46, at 6-7.

258. Cover, *supra* note 248, at 16.

only as the unforeseen effects of an intended intervention, but also as the unlikely instruments of an unplotted strategy.”²⁵⁹ Indeed, in 2005 when the King of Nepal declared emergency rule, the Nepal Bar Association articulated its *objections* to his usurpation of power in the “instrumentalist” language of first-wave culture change projects—language that first-wave law and development scholars retrospectively feared would diminish the capacity of the legal profession to act “as a potential source of opposition to state policy.”²⁶⁰ “We, the lawyers are *social engineers*,” the Nepal Bar Association pronounced, “and we cannot remain silent towards the incidents and developments arising against . . . rights of the sovereign people.”²⁶¹

I have instead suggested that we should understand the contemporary turn to culture as a tool of governance—as an effort to implement the rule of law through the self-ordering of individual people, and as the idea that *through culture* interveners can make law and development internal and can regulate individuals from the inside. To capture this idea, I suggested that neocultural interventionists want culture to accomplish highly particular regulatory work. They want culture to change people’s conscious values and beliefs about law (I called this culture as consciousness). And they want these values and beliefs to constrain and determine social behavior when the rules of law alone cannot (I called this culture as lawlike rules). And perhaps most suggestively, neocultural interventionists want culture to shape people who come to see law and development in similar terms as they do. In this way, they risk eliding the conflictual nature of concepts like law and development.

My ethnographically grounded accounts of culture served to illustrate some of the gaps, conflicts, and blind spots that will likely accompany law and development projects that seek to transform the consciousness and behaviors of ordinary people into a field of governance.

259. FERGUSON, *supra* note 235, at 20.

260. GARDNER, *supra* note 10, at 101.

261. Resolution on Human Rights, Rule of Law and Independence of Judiciary, Adopted by the General Assembly of Nepal Bar Association (June 4, 2005), www.nepalbar.org/activities.html (emphasis added).

Stepping back from my specific examples in Nepal, we could observe further that a key lesson of cultural analysis is that actors engage with the world through their conceptual frameworks and in turn are shaped by these engagements. This lesson is no less relevant for development planners than it is for development beneficiaries. Development planners should grapple, then, with how thinking with culture as a conceptual tool to design development policy constitutes their own knowledge about development and their attendant capacities to comprehend the limits of that knowledge.

In the early 1980s, a group of scholars criticized what they saw as the first wave of law and development's narrow field of vision. Fitzpatrick, for example, argued that "[t]he outer limits of acceptable change allowed for by theorizing on law and modernization is that law must somehow be more responsive to 'the disaffected' and 'the poor', [but] basically to reconcile them to existent structures of power."²⁶² Boaventura de Sousa Santos similarly suggested that law and development studies emphasized "the positive role of law—an ideological bias in favour of lawful social transformation and against revolutionary processes. And thus they become, whatever the intentions of their cultivators, little more than a rhetoric of legitimation."²⁶³ These concerns remain prescient today. At the time of this writing, the Nepali Maoists have been voted into power. After years of violent struggle, they won a landslide number of seats in elections to a constituent assembly and are dismantling a 240-year-old monarchy²⁶⁴—demonstrating, in

262. PETER FITZPATRICK, *LAW AND STATE IN PAPUA NEW GUINEA* 48 (1981).

263. Boaventura de Sousa Santos, *Science and Politics: Doing Research in Rio's Squatter Settlements*, in *LAW AND SOCIAL ENQUIRY: CASE HISTORIES OF RESEARCH* 261, 270 (Robin Luckham ed., 1981), *quoted in* FITZPATRICK, *supra* note 261. In fact, as committed as some of today's legal scholars are to promoting the rule of law in the name of progressive social change, others are now challenging these efforts in language reminiscent of Left indictments of first-wave reforms. The problem for these critical scholars is less about formalism or insufficient attention to culture than about confronting the ways in which the rule of law itself serves the interests of global capital against the class interests of the world's poor. See UGO MATTEI & LAURA NADER, *PLUNDER: WHEN THE RULE OF LAW IS ILLEGAL* (2008).

264. In April 2008, Nepal held elections to a constituent assembly to draft a new constitution. The Communist Party of Nepal (Maoist) won thirty-eight percent of the total elected seats, a significantly larger percentage than any

very present ways, the conflictual forms through which social transformations sometimes happen and both the possibilities and limitations of law and culture as tools of change.

Decades of law and development practice have resigned us to the manifold challenges that flow from efforts to transplant law and legal institutions in their imperial and disciplining forms. Inviting people themselves to imagine the disciplining worlds that development planners wish them to inhabit through voluntary culture change is perhaps more seductive, but likely no less illusory, and perhaps even more so if we mistakenly frame a turn to culture as a turn to context itself. Of course, there is no way to know whether the vision driving the turn to culture in the scholarship I have examined—stable, equitable, peaceful, and prosperous social orders in which all human subjects are governed in good faith by law—will ever be possible to achieve. But there seems every reason to conclude that to live and work as if it were possible will require us to confront, at nearly every turn, the contentious politics of social change.

other of Nepal's major political parties. See THE CARTER CTR., FINAL REPORT ON OBSERVING NEPAL'S 2008 CONSTITUENT ASSEMBLY ELECTION 11, 14 (Nov. 10, 2008) (reporting that "the majority of reports received by The Carter Center indicate that the electoral process overall was a credible reflection of the will of the people"), www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/FinalReportNepal2008.pdf. The Communist Party of Nepal (Maoist) subsequently formed a coalition government, and in August 2008, its Party Chairman Prachanda was elected prime minister.